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PAROLE COMMISSION PHASEOUT ACT OF 1995

HEARING
BEFORE THE
SUBCOMMITTEE ON CRIME
OF THE
COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES
ONE HUNDRED FOURTH CONGRESS
SECOND SESSION

S. 1507

PAROLE COMMISSION PHASEOUT ACT OF 1995

JUNE 6, 1996

Serial No. 101

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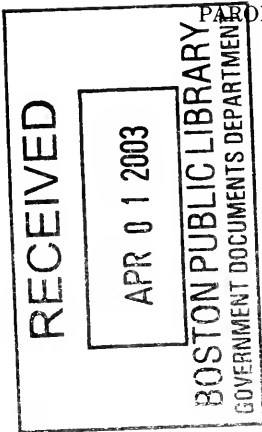
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PAROLE COMMISSION PHASEOUT ACT OF 1995

THURSDAY, JUNE 6, 1996

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON CRIME,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to notice at 9:45 a.m., in Room 2237, Rayburn House Office Building, Hon. Bill McCollum (chairman of the subcommittee) presiding.

Present: Representatives Bill McCollum, Steve Chabot, Ed Bryant of Tennessee, Charles E. Schumer, Robert C. Scott, Zoe Lofgren, and Melvin L. Watt.

Also present: Paul J. McNulty, chief counsel; Nicole F. Robilotto, assistant counsel; Audray Clement, secretary; and Tom Diaz, minority counsel.

OPENING STATEMENT OF CHAIRMAN McCOLLUM

Mr. McCOLLUM. This hearing of the Subcommittee on Crime is called to order.

We are here today to consider S. 1507, the Parole Commission Phaseout Act of 1995, which was passed by the Senate on December 22, 1995. The Parole Commission is set to expire on November 1, 1997. S. 1507 would extend the Commission for an additional 5 years.

Nearly 12 years ago, Congress abolished parole in the Federal system and agreed to phase out the Parole Commission. In 1990 we extended the time line for the phaseout by an additional 5 years. Now Congress is being asked to extend it once again.

The question of whether we should extend the Parole Commission for another 5 years is not a simple one. This is a case of competing interests. On the one hand, the importance of Government downsizing and the reality of budgetary constraints would clearly argue in favor of closing the Commission as soon as possible. On the other hand, the continued presence of old-law offenders in the system requires the existence of some entity for processing parole requests.

There are several considerations which we will hear today to justify support for S. 1507. We will be told that the constitutional requirements—specifically, the *ex post facto* clause—necessitate the extension of the Commission until the year 2002. But what will happen after that? Well, not the same constitutional considerations require another extension.

If we assume that the Parole Commission will not continue until the last old-law prisoner is out of the system, which presumably will be much longer than the year 2002, at what point is the Commission no longer needed? In other words, when will there be too few old-law prisoners to justify the continued existence of the Commission?

Another issue is raised by the Parole Commission. In a February 15 letter to me, the Commission noted that many of the old-law prisoners in the Federal system are serious offenders. Some of these offenders have complex and time-consuming challenges for parole authorities and cannot be readily handled by other less experienced Federal authorities.

But if the Parole Commission was merged into an existing entity such as the Justice Department, couldn't this expertise be transferred to the new location?

These are some of the questions I am looking forward to discussing today, and I really, for one, have not decided the best course that we should take. I am looking for a better idea if there is one, as they say in the television ads, and I will be more than happy to hear what everybody has to say today.

[The bill, S. 1507, follows:]

104TH CONGRESS
1ST SESSION

S. 1507

IN THE HOUSE OF REPRESENTATIVES

DECEMBER 27 (legislative day, DECEMBER 22), 1995

Referred to the Committee on the Judiciary

AN ACT

To provide for the extension of the Parole Commission to oversee cases of prisoners sentenced under prior law, to reduce the size of the Parole Commission, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

1 **SECTION 1. SHORT TITLE.**

2 This Act may be cited as the “Parole Commission
3 Phaseout Act of 1995”.

4 **SEC. 2. EXTENSION OF PAROLE COMMISSION.**

5 (a) IN GENERAL.—For purposes of section 235(b)(1)
6 of the Sentencing Reform Act of 1984 (98 Stat. 2032)
7 as it related to chapter 311 of title 18, United States
8 Code, and the Parole Commission, each reference in such
9 section to “ten years” or “ten-year period” shall be
10 deemed to be a reference to “fifteen years” or “fifteen-
11 year period”, respectively.

12 (b) POWERS AND DUTIES OF PAROLE COMMIS-
13 SION.—Notwithstanding section 4203 of title 18, United
14 States Code, the United States Parole Commission may
15 perform its functions with any quorum of Commissioners,
16 or Commissioner, as the Commission may prescribe by
17 regulation.

18 **SEC. 3. REPEAL.**

19 Section 235(b)(2) of the Sentencing Reform Act of
20 1984 (98 Stat. 2032) is repealed.

Passed the Senate December 22, 1995.

Attest: KELLY D. JOHNSTON,
Secretary.

Mr. McCOLLUM. Mr. Scott, would you like to make an opening statement?

Mr. SCOTT. Thank you, Mr. Chairman.

I think the question you have raised is what to do with the old law. It is certainly the focus of this hearing. I look forward to the comments of the panelists, and also my preference would be to continue the Commission because we may at some future date regain our senses and have the possibility of lengthening sentences if we restore parole. That way we would have the possibility of keeping the most heinous, high-risk prisoners longer and let the low-risk prisoners out in a shorter period of time, using our prison space in a much more intelligent way.

That debate is probably for another forum, but I think some of what the Parole Commission does will come out during the comments, and I look forward to those comments today.

Thank you, Mr. Chairman.

Mr. McCOLLUM. Thank you very much, Mr. Scott.

Mr. McCOLLUM. I would like to extend a warm welcome to our guests this morning. Judge Richard Arcara, Western District of New York, is here on behalf the U.S. Judicial Conference. Judge Arcara was appointed to the bench in 1988 and previously served as the U.S. Attorney for the Western District of New York.

Welcome this morning, Judge.

Next we have Edward Reilly, Chairman of the U.S. Parole Commission. Mr. Reilly was appointed Chairman of the Commission in August 1992. He is a former Kansas State senator.

Welcome to you.

Last but not least, we are also pleased to have with us this morning Robert Litt on behalf of the Justice Department. Mr. Litt is the Deputy Assistant Attorney General in the Criminal Division. I appreciate all you coming today.

I think it is only appropriate if you go first, Judge Arcara. If you wouldn't mind proceeding, please do. I understand, by the way, that it is your birthday. Is that right?

Judge ARCARA. Yes, sir; 56 today.

Mr. McCOLLUM. Happy birthday. We won't sing it. I sometime do that, but not in a hearing.

Judge ARCARA. My wife made me promise I would be home for dinner tonight. But that is up to you, sir.

Mr. McCOLLUM. That is quite a birthday, to come up here with us. We appreciate that you are willing to share some of that day with us.

STATEMENT OF HON. RICHARD J. ARCARA, JUDGE, U.S. DISTRICT COURT, WESTERN DISTRICT OF NEW YORK

Judge ARCARA. Mr. Chairman and members of the subcommittee my name is Richard J. Arcara. I am a U.S. district judge for the Western District of New York in Buffalo. I am appearing before you today as a representative of the Committee on Criminal Law of the U.S. Judicial Conference.

I would first like to express my appreciation on behalf of the Judicial Conference for the opportunity to testify on this issue. It is the Conference's hope that the testimony we provide here today assists you in coping with this critical issue. Please understand that

it is offered in complete recognition that the decisions which will prescribe policy for the future are yours and not ours to make.

You have asked me to comment on S. 1507, the Parole Commission Phaseout Act of 1995.

The Judicial Conference, pursuant to a recommendation of the Federal Courts Study Committee, has endorsed the continuation of the Commission or the creation of a successor agency within the executive branch to perform the Commission's functions. Although either approach is satisfactory to the Conference, I would urge you to carefully consider the extension of the Commission for 5 years as proposed under S. 1507.

The reasons underlying this position are well summarized in the joint report of the Administrative Office of the U.S. Courts and the U.S. Parole Commission to the Committee on Appropriations of the U.S. House of Representatives and the Committee on Appropriations of the U.S. Senate Concerning the Feasibility of Transferring the Functions of the U.S. Parole Commission to the Federal Judiciary, dated March 1, 1996. And I will refer to it as the report.

I understand you each have a copy of the report. Therefore, I will not belabor its contents. However, I do wish to emphasize three essential points with you here today that I hope you will keep in mind as you confront this issue:

One, the functions carried out by the Parole Commission must continue to be performed, even after the anticipated expiration of the Commission on November 1, 1997.

As you know, the Sentencing Reform Act of 1984 eliminated eligibility for parole for all Federal crimes committed on or after November 1, 1987. To deal with parole-eligible offenders who committed crimes before November 1, 1987, Congress has extended the life of the Parole Commission until November 1, 1997.

Eligibility for parole is an integral part of the punishment for offenders who committed their crimes before November 1, 1987. Without the Parole Commission or some other entity authorized by statute to perform the Parole Commission's functions, parole-eligible inmates who are entitled to parole rights would inevitably file habeas corpus petitions, seeking release on the ground that their right to a determination or review of these "final" parole release dates had been unconstitutionally eliminated. There would be a real possibility that the petitions might be successful and that some of the most dangerous criminals in the Federal system would be released on writs of habeas corpus.

Additionally, no authority would exist to review and rescind the release dates of inmates who engage in misconduct while in prison.

The most expedient and cost-effective means of ensuring performance of necessary, ongoing parole functions is a simple 5-year extension of the Parole Commission to November 1, 2002, as proposed under S. 1507. This approach would allow the Commission to carry on its work efficiently, necessitating no additional costs or burdens to any other agency, while simultaneously allowing the Commission to continue its steady downsizing of operations in tandem with the shrinking population of parole-eligible persons.

An extension of the Parole Commission by 5 years makes extraordinary practical sense. In 5 years, the problems with parole-eligible prisoners will be far different than what they are today.

Because of the diminishing number of parole-eligible prisoners, it will be far easier to predict the solution necessary to deal with them. At the end of fiscal year 1996, there will be approximately 6,723 parole-eligible prisoners. Many of these will need new release dates before they serve their complete sentences.

Although some additional parole-eligible inmates will continue to enter the system, in 5 years the number will be down to 2,131 incarcerated inmates, many of whom will be reaching the end of their terms. Accordingly, the most reasonable approach is simply to extend the Parole Commission's tenure.

Three, transfer of Parole Commission functions to the Federal judiciary would be costly, inefficient, and would result in a dilution of already scarce judicial resources. In addition, the assumption by the courts of responsibility for parole hearings, revocation hearings, and appeals would be disruptive and would have a detrimental impact on the administration of justice.

Such a transfer would not result in savings through the elimination of the Parole Commission's appropriation. Any direct costs avoided would be more than outweighed by the increased costs to the judiciary and related agencies in carrying out the Parole Commission functions. Indeed, the transfer of parole release hearings to the judiciary would actually increase the overall costs of performing essential Parole Commission responsibilities.

For example, thousands of additional hearings would be imposed on the judiciary under statutes and rules developed for an executive branch agency. This would divert judicial officers from their other important criminal justice responsibilities. Parole-eligible prison inmates would have to be transported to district courts for hearings at additional expense to the U.S. Marshals Service. In the alternative, judicial officers would be required to travel to Federal prisons, resulting in new security risks and lost court time. Judicial officers and support personnel would also have to be trained in unfamiliar policies and procedures which will, inevitably, be phased out within a few short years.

Given these and other serious problems described in the report, a transfer of parole functions to the judiciary at this time would be unwise in addition to being costly.

In conclusion, I wish to note that the Parole Commission is a highly specialized organization with a unique mission. Over the decades, it has acquired an efficiency and expertise of which we should take full advantage. In this age of fiscal responsibility, it would be a shameful waste of precious resources to do otherwise.

Once again, I thank you for the opportunity to appear before you today. I am prepared to respond to any questions you might have about this matter.

Mr. MCCOLLUM. Thank you very much, Judge Arcara.

Mr. Litt, I understand the sequence would be preferable if you would go at this point, and we welcome your testimony. And, by the way, all of the record—the record will take in all the testimony that you have giving in writing in full unless there is objection.

Without objection, so ordered, and you may proceed to give us all or a summary of your testimony.

STATEMENT OF ROBERT S. LITT, DEPUTY ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION, DEPARTMENT OF JUSTICE

Mr. LITT. Thank you, Mr. Chairman.

I am pleased to be here today to testify on the proposal that the Department submitted last year to Congress to extend the existence of the U.S. Parole Commission until November 1, 2002.

The Department of Justice believes that it is essential for Congress to extend the life of the Parole Commission in order to avoid constitutional problems that would otherwise arise with respect to prisoners and parolees whose crimes were committed prior to November 1, 1987, which is the date sentencing guidelines took effect. Those are usually referred to as old-law prisoners.

We appreciate your willingness to take up consideration of this issue at present time because we believe that, given the time frame that the Commission is operating under at the present time, there are important reasons why this legislation should be enacted before this Congress adjourns.

As you know, parole eligibility for Federal offenders was abolished effective November 1, 1987, by the Sentencing Reform Act of 1984. However, section 235(b) of the Sentencing Reform Act extended the life of the Parole Commission for an additional 5 years. Congress took this step in 1987 because it recognized that old-law offenders that committed those crimes prior to November 1, 1987, would be entitled to continued parole eligibility under the prior law. It was clear that for those old-law offenders, parole could not be retroactively abolished without violating the ex post facto clause.

However, at the time of the Sentencing Reform Act, Congress believed that the Parole Commission could be phased out at the end of 5 years after taking the opportunity to set final release dates for the remaining old-law prisoners.

In 1990, however, the Congress revisited the ex post facto provision and concluded at that time that setting a single, final release date would also violate the Constitution by retroactively depriving old-law prisoners of the periodic parole consideration that was mandated at the time they were sentenced. The Department of Justice shared Congress's concern and welcomed the additional 5-year extension that Congress passed effective on November 1, 1992. We are now approaching the same problem as the phaseout date of November 1, 1997, that was enacted by that law approaches.

The Parole Commission estimates that there will still be approximately 5,500 old-law prisoners incarcerated in Federal prisons on that date as well as almost 10,000 old-law parolees who are under the jurisdiction of the Parole Commission.

It is important to ensure that there remains an adequate parole function for these offenders until their sentences are completed to avoid ex post facto problems. However, if the Parole Commission goes out of existence on November 1 of next year as it is presently scheduled to do, there won't be any entity that is able to provide the parole consideration to which we all agree these prisoners are constitutionally entitled.

The Department of Justice strongly wants to avoid the kind of litigation that we would be faced with if this—if the Parole Com-

mission were to go out of business. We would be faced with habeas corpus petitions or mandamus petitions by old-law offenders challenging the legality of their continued incarceration without an opportunity for parole hearings.

Accordingly, last December the Department of Justice transmitted to Congress legislation entitled the "Parole Commission Phase-out Act of 1995." This legislation, which would extend the life of the Parole Commission by another 5 years, was approved by the Attorney General, after considerable thought and study, as the most sensible and cost-effective way to continue the current parole function.

Our population projections indicate that by November 1, 2002, which would be the new phaseout date under this law, the old-law prisoner population will have declined to the point that we will at that time be able to eliminate the Parole Commission. The relatively small workload that would remain at that time could be adequately transferred another component or branch of Government. At the present time, we think that the Commission's caseload is too large for that to be done.

In particular, we don't think we agree with the testimony from the judicial branch here that it would not be appropriate or feasible or economical to impose on the Federal courts the burden of conduct of several thousand parole hearings annually, which is what it would be for the next few years.

In addition, we believe extending the Parole Commission is no more costly to the Government than transferring the Commission's functions elsewhere because the number of decisionmakers and staff would remain the same.

As you know, the Commission in recent years has taken substantial and very effective steps to downsize, reflecting its current case load, and the downsizing will continue under the legislation we propose. The proposed 5-year extension would reduce the number of Commissioners and authorize the Parole Commission to operate with any quorum of Commissioners, including a single Commissioner if the workload justifies that.

You asked, Mr. Chairman, about the option of transferring the functions of the Parole Commission to the Department of Justice. Our view is that this would not result in any cost savings because of the substantial and effective steps that the Commission has already taken to downsize and because of the fact that we would still need to have the people to do the functions that the Commission is doing now.

We also think that there is a substantial benefit to having the parole decision made by a body that is independent of the Department of Justice. We frequently have in parole hearings assistant U.S. attorneys or other representatives of the Department of Justice who are opposing parole for prisoners, and we believe that the perception of fairness in the process would be greatly enhanced if the parole decision continues to be made by an independent body.

In conclusion—not quite there yet.

Mr. MCCOLLUM. I am not trying to cut you off. I thought had you finished. Go ahead, please.

Mr. LITT. The legislation we have proposed is urgently needed to prevent legal uncertainty surrounding the custody status of the

thousands of old-law Federal prisoners still in our system and to permit the Parole Commission to continue downsizing consistent with the caseload. We see no realistic alternative to this proposed legislative solution, and we ask for its prompt passage.

Thank you, Mr. Chairman.

Mr. MCCOLLUM. Thank you very much.

Mr. LITT. I, too, would be pleased to answer any questions.

Mr. MCCOLLUM. I will certainly promulgate a few in a few minutes, but I think, Mr. Reilly, you should be given the opportunity first to give us your words.

STATEMENT OF EDWARD F. REILLY, JR., CHAIRMAN, U.S. PAROLE COMMISSION, ACCOMPANIED BY PETER HOFFMAN, STAFF DIRECTOR

Mr. REILLY. Thank you very much, Mr. Chairman and members of the subcommittee.

Let me first pause to say that Judge Arcara is certainly dedicated from the judicial branch to coming and speak on behalf the Commission and the problems associated with the judicial branch as we see them. He came back from the west coast from the Judicial Conference, and also on his birthday, and I guess he heeded the advice of Malcolm Forbes who said, "As you get older don't slow down; speed up. You don't have much time left."

We hope you have a lot of time left, Judge, but we do appreciate your being here. We appreciate very much the Department being here this morning.

I also, Mr. Chairman, want to thank, on behalf of the Parole Commission, Mr. McNulty and Dan Bryant with whom I have had a number of contacts in the course of my serving as Chairman of this Commission over the years, and both of them have responded very well to me when I have had matters that have come before them, and they have called me.

I am pleased to have this opportunity to appear before you in support of the proposal that the Department of Justice sent to Congress last year to extend the life of the Parole Commission by 5 years, from November 1, 1997, to November 1, 2002.

It is my belief that the Department's 5-year extension plan is the most cost-effective way for Congress to avoid the serious ex post facto problem associated with the elimination of the Federal parole function. Legislation along the lines of S. 1507, which was passed by the Senate on December 22, 1995, should be passed by the House of Representatives before this session of Congress comes to an end.

The need for prompt enactment of legislation to address this issue is clear. By this fall, section 235(b)(3) of the Sentencing Reform Act of 1984 will require the Parole Commission to begin holding hearings and setting "final" release dates for approximately 5,500 parole-eligible prisoners who will still be incarcerated as of November 1, 1997.

Yet these release dates, I emphasize, cannot be "final" because it is now beyond question that the elimination of periodic parole reviews for old-law prisoners would constitute an ex post facto increase in punishment. This problem was clearly explained in the legislative history that accompanied the first 5-year extension en-

acted by Congress in 1990 under which the Commission is presently operating.

Under section 235(b)(3), the Commission is faced with having to conduct a large number of additional parole hearings in fiscal year 1997, which will only result in the establishment of release dates subject to immediate constitutional challenge in the Federal courts. The Parole Commission needs to have legislation passed in this session of Congress so that it can avoid having to implement this expensive and constitutionally invalid process.

Many of these approximately 5,500 prisoners are dangerous or otherwise serious offenders who are serving long-term sentences and, for the protection of the public, will need to be incarcerated well beyond November 1, 1997. I believe that it would be extremely unwise to give these prisoners the opportunity to seek early release on writs of habeas corpus through challenges to the legality of their parole decisions as the November 1, 1997, deadline approaches.

Although several different proposals for continuing the Federal parole function have been suggested, the 5-year extension plan embodied in S. 1507 is, in my view, by far the most cost-effective solution. At the end of fiscal year 1997, there will still be approximately 5,500 parole-eligible prisoners in the Bureau of Prisons and approximately 9,700 parolees remaining under the jurisdiction of the Parole Commission. Hearings and decisions for these remaining old-law offenders will be required by various provisions of the Parole Commission and Reorganization Act of 1976, which continues to govern these old-law cases.

During the fiscal year beginning November 1, 1997, for example, there will still be approximately 2,400 hearings and 7,800 decisions based on file review that will be required for these old-law offenders.

I must also note that the Commission also is responsible for prisoners who have been convicted in foreign courts and transferred to the United States under treaty, as well as State witness protection cases who have been transferred to Federal parole supervision. These cases will all continue.

When I was appointed chairman of the Parole Commission in 1992, it had 145 employees and three regional offices. Since that time, we have pursued an aggressive program of downsizing and streamlining this agency. We have eliminated all regional offices, reduced the number of Commissioners from seven to four, and reduced the total number of employees to 49, including the four Commissioners.

Our fiscal year 1997 budget request is for 43 full-time permanent positions, including the Commissioners, and 53 work-years to carry out these functions. The Commission is, therefore, a very small, but efficient, agency in relation to the case load for which it is responsible.

Many of our administrative support functions are already provided by the Department of Justice, and I anticipate a continued orderly downsizing if the Commission's existence is extended over the next 5 years. The Department's proposed legislation would, for example, further reduce the number of Commissioners that we currently have from four to three.

In contrast, proposals to transfer the workload of the Commission to the judicial branch would, in my view, have serious practical problems and only increase the ultimate cost for the taxpayer. These problems and projected costs are set forth in the joint report of the Administrative Office and the Parole Commission to the Committee on Appropriations which was submitted on March 1, 1996.

In my view, the parole function for old-law cases would be more efficiently discharged by simply leaving an existing Commission that is doing the job in place.

Of particular importance, I believe that it is essential for Congress to maintain current agency staff expertise in discharging this complex and specialized legal function, particularly given the high proportion of violent and otherwise serious offenders that make up the agency's case load as the less serious offenders reach the end of their sentences.

As Chairman of the Commission, I am greatly concerned to retain competent staff while continuing to downsize. I fear that this will not be possible if Congress delays the passage of remedial legislation.

In sum, I believe the 5-year extension plan is the simplest and best solution even though the postponement of the Commission's sunset date to November 1, 2002, will require additional congressional action to consider further legislative action in another 5 years. By that time, the Commission's caseload will have been reduced to the point where options that are now unrealistic, including a transfer of functions, will become feasible.

I would call to the attention of the committee that in the year 2002 it is estimated we will have 1,795 inmates incarcerated and 3,200 under supervision, for a total of approximately 5,000.

In closing, Mr. Chairman, I would like to emphasize to the subcommittee that the ultimate goal of any parole operation is the protection of the public safety. I am not here as an advocate for the revitalization of parole in the Federal system. Our record at the U.S. Parole Commission during the period since I assumed the position of Chairman demonstrates that we have aggressively pursued the downsizing of the agency. I am here, however, to alert the Congress to the need for prompt action on this one issue.

A straightforward 5-year extension of the Parole Commission will ensure that the many dangerous offenders who are still serving sentences for crimes committed prior to November 1, 1987, are not given opportunities for early release from prison through the administrative disruption and legal uncertainty that would be created by any of the more complex solutions that have been proposed. A transfer of functions from the Parole Commission to some other governmental entity would only make the responsible discharge of this critical decisionmaking function more difficult.

The Commission can continue to protect the public safety as it has done so well. I must say, I think this Congress and previous Congresses can be proud of the success that the U.S. Parole Commission has enjoyed in terms of its guideline system that is in place. I think it can be done at the most reasonable cost to the taxpayer if Congress indeed passes the Government's 5-year extension plan before fiscal year 1997.

I thank the subcommittee, Mr. Chairman and members of the committee, for the opportunity to appear today, and I will be happy to stand for questions also.

[The information follows:]

JOINT REPORT
OF
THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS
AND
THE UNITED STATES PAROLE COMMISSION
TO
THE COMMITTEE ON APPROPRIATIONS
OF THE UNITED STATES HOUSE OF REPRESENTATIVES
AND
THE COMMITTEE ON APPROPRIATIONS
OF THE UNITED STATES SENATE
CONCERNING
THE FEASIBILITY OF TRANSFERRING THE FUNCTIONS OF
THE UNITED STATES PAROLE COMMISSION
TO THE FEDERAL JUDICIARY

4

MARCH 1, 1996

EXECUTIVE SUMMARY

This report has been prepared jointly by the Administrative Office of the United States Courts and the United States Parole Commission in response to requests of the Committee on Appropriations of the United States House of Representatives and the Committee on Appropriations of the United States Senate. The two agencies were asked to assess the feasibility of transferring the workload of the Parole Commission to the judiciary by September 30, 1996.

The Sentencing Reform Act of 1984 (SRA) eliminated eligibility for parole for all federal crimes committed on or after November 1, 1987. To deal with parole-eligible offenders who committed crimes before November 1, 1987, the SRA continued the Parole Commission until November 1, 1992. Because the SRA did not make any provisions for necessary, ongoing parole functions after that date, Congress extended the life of the Parole Commission until November 1, 1997. However, even after that date, the functions currently carried out by the Parole Commission must continue to be performed.

Transfer of Parole Commission functions to the federal judiciary would be costly and inefficient and would result in a dilution of already scarce judicial resources. In addition, the assumption by the courts of responsibility for parole hearings, revocation hearings, and appeals would be disruptive and would have a detrimental impact on the administration of justice.

Such a transfer would not result in savings through the elimination of the Parole Commission's appropriation, as has been suggested. Any direct costs avoided would be more than outweighed by the increased costs to the judiciary and related agencies in carrying out the Parole Commission functions. Indeed, the transfer of parole release hearings to the judiciary would actually increase the overall costs of performing essential Parole Commission responsibilities.

For example, thousands of additional hearings would be imposed on the judiciary under statutes and rules developed for an executive branch agency. Judicial officers and support personnel would have to be trained in unfamiliar policies and procedures which will, inevitably, be phased out within a few short years. Parole-eligible prison inmates would have to be transported to district courts for hearings at additional expense to the U.S. Marshals Service. In the alternative, judicial officers would be required to travel to federal prisons, resulting in new security risks and lost court time. Given these and other serious problems described in section III of this report, a transfer of parole functions to the judiciary at this time would be unwise in addition to being costly.

The Department of Justice has proposed a five-year extension of the Parole Commission, to November 1, 2002, as well as a gradual reduction in the size and budget of the Commission. A bill adopting this approach, S. 1507, was passed by the United States Senate on December 22, 1995. The Judicial Conference of the United States, pursuant to a recommendation of the Federal Courts Study Committee, has endorsed the continuation of the Parole Commission or the creation of a successor agency within the executive branch to handle parole-eligible offenders.

I. INTRODUCTION

This report has been prepared jointly by the Administrative Office of the United States Courts and the United States Parole Commission in response to requests of the Committee on Appropriations of the United States House of Representatives and the Committee on Appropriations of the United States Senate. The two requests were contained in the respective House and Senate Appropriations Committee Reports on H.R. 2076, the fiscal year 1996 appropriations for the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies.¹ Both Committee reports noted that after the scheduled sunset of the Parole Commission in November 1997, a number of persons eligible for parole would remain either incarcerated or under supervision, requiring continuing case work review. The reports directed the two agencies to assess the feasibility of transferring the workload of the Parole Commission to the judiciary by September 30, 1996. Staff from these two agencies, in coordination with other affected governmental entities, engaged in a detailed examination of the feasibility and potential repercussions of many different options, taking into account factors such as legality, practicality, and costs.

II. BACKGROUND

The Sentencing Reform Act of 1984 (SRA),² eliminated eligibility for parole for all federal crimes committed on or after November 1, 1987. To deal with parole-eligible offenders who committed crimes before November 1, 1987, the SRA was amended to continue the Parole Commission until November 1, 1992. Because the

¹ The House Committee Report provides as follows:

Phase Down of the Parole Commission.--The Committee understands that, after the sunset of the Parole Commission, there will still be casework that will require review. The Committee requests that the Parole Commission and the Judiciary conduct a joint study to assess the feasibility of transferring all remaining workload of the Commission to the Federal Judiciary by September 30, 1996, and report its findings of this study to the Committee by March 1, 1996.

H.R. Rep. No. 196, 104th Cong. 1st Sess. 12 (1995). A similar directive was provided by the Senate Committee Report. See S. Rep. No. 139, 104th Cong., 1st Sess. 85 (1995).

² Pub. L. No. 98-473, title II, chapter II, § 235, 98 Stat. 1987, 2031-33 (1984).

SRA did not make any provisions for necessary, ongoing parole functions after that date, Congress extended the life of the Parole Commission until November 1, 1997.³ However, even after that date, the functions currently carried out by the Parole Commission must continue to be performed.

The extension of the Parole Commission to 1997 was based upon the concern that the elimination of the Commission would create "substantial questions under the ex post facto clause of the Constitution."⁴ The SRA does not make any provision for parole-eligible persons who are sentenced after the expiration of the Commission, inmates who have a constitutional right to review of their release dates, inmates who because of serious disciplinary infractions should have their release dates rescinded, and persons reincarcerated by the district courts following a revocation of their release who would be entitled to further parole consideration. All of these situations involve rights that have been guaranteed by statute and regulation in effect prior to the SRA, and denial of those rights would raise serious questions under the ex post facto clause of the fifth amendment to the United States Constitution.

Eligibility for parole is an integral feature of the punishment for offenders who committed their crimes before November 1, 1987 ("old law offenders").⁵ If the Parole Commission established a final release date that required a substantial period of incarceration, that prisoner would cease to be eligible for further parole consideration and in effect would have to serve a determinate sentence.⁶ Without the Parole Commission or some other entity authorized by statute to perform the Parole Commission's functions, parole-eligible inmates who are entitled to the rights enumerated above would inevitably file habeas corpus petitions seeking release on the ground that their right to a determination or review of these "final" parole release dates had been unconstitutionally eliminated. There would be a real possibility that the petitions might be successful and that some of the most serious criminals in the

³ Judicial Improvements Act of 1990, Pub. L. No. 101-650 § 316, 104 Stat. 5089, 5115 (1990).

⁴ See H.R. Rep. No. 734, 101st Cong., 1st Sess. 20 (1990).

⁵ See Warden v. Marrero, 417 U.S. 653, 663 (1974). In that case, the Court held "a repealer of parole eligibility previously available to imprisoned offenders would clearly present the serious question under the ex post facto clause of Art. I, § 9, cl. 3, of the Constitution, of whether it imposed a 'greater or more severe punishment' than was prescribed by law at the time of the... offense."

⁶ Although the Commission presently sets release dates for old law offenders up to 15 years in advance, these release dates are only "presumptive." See 28 CFR § 2.12 (1994). Approximately 20 percent of these dates are changed at review hearings.

federal system would be released on writs of habeas corpus. Additionally, no authority would exist to review and rescind the release dates of inmates who engage in misconduct.

To address these issues, the Department of Justice has proposed a five-year extension of the Parole Commission from November 1, 1997 to November 1, 2002. A bill adopting this approach, S. 1507,⁷ was passed by the United States Senate on December 22, 1995.⁸ The Judicial Conference of the United States, pursuant to a recommendation of the Federal Courts Study Committee, has endorsed the continuation of the Parole Commission or the creation of a successor agency within the executive branch to handle parole-eligible offenders.⁹

III. DISCUSSION

A. The Transfer of the Parole Commission's Functions to the Judiciary Would Not Result in the Savings Anticipated.

Any costs avoided by elimination of the Parole Commission's appropriation would be more than outweighed by the increased costs to the judiciary and related agencies in carrying out the Parole Commission's functions over a comparable period of time. It has been suggested that abolishing the Parole Commission as of September 30, 1996 would save \$36 million over the next five years and that "distributing [the Commission's] current work load to other offices will have no or little effect on pending cases."¹⁰

The \$36 million figure was apparently calculated by multiplying the Parole Commission's actual \$7.2 million fiscal year 1995 appropriation by five. However, the Parole Commission's initially projected funding levels for the next few years anticipate much lower required appropriations, dropping from \$5.4 million in fiscal year 1996 to \$1 million in fiscal year 2001. The cumulative total of the Parole Commission's budget for the next five years would likely be no more than \$22 million. The cost of any other alternative to the existing Parole Commission structure

⁷ S.1507, 104th Cong., 1st Sess. (1995).

⁸ See 141 Cong. Rec. S19250 (1995).

⁹ September 1990 Report of the Proceedings of the Judicial Conference of the United States, p. 61.

¹⁰ "Illustrative Republican Spending Cuts: Toward Meeting *Contract with America* Offset Requirements," U.S. House of Representatives, Committee on the Budget (March 16, 1995). See also H.R. Rep. No. 159, 104th Cong. 1st. Sess. 82 (1995).

must be measured against this amount, not \$36 million. Moreover, the other assumption, that a transfer of the Commission's workload to the judiciary will have "no or little effect on pending cases," is also erroneous, as shown below.

Further, the Parole Commission is authorized a total of only 62 work years in fiscal year 1996, and it will continue to downsize next year. As the discussion below makes clear, significantly larger numbers of court work years would be required should the parole function be transferred to the judiciary. In brief, transferring the parole function from a specialized executive branch agency with a small staff, which will be further downsized, to hundreds of judicial officers plus support staff and/or thousands of probation officers plus support staff located throughout the United States and its territories, would be extraordinarily inefficient and costly, as shown in detail below.

B. The Transfer of Parole Functions to the Judiciary Would Create Serious Problems of Logistics, Training, and Public Safety and Would Actually Increase Overall Costs of Performing Essential Parole Commission Responsibilities.

1. **Imposing The Parole Hearing Function on U.S. Magistrate Judges and/or U.S. District Judges Would Impose Extensive Costs Upon the Judiciary and the U.S. Marshals Service, Create Potential Security Risks for Judicial Officers, Impose An Enormous Administrative Burden Upon the Judiciary, and Require Extensive and Meticulous Revisions of Numerous Affected Statutory and Administrative Provisions.**

If it were determined that the responsibility for holding the hearings to set parole release dates should be assigned to existing judicial entities, it would also have to be determined which judicial officials would actually conduct the hearings. Conducting these hearings and making the decisions required by the Parole Commission and Reorganization Act¹¹ would have to be performed either by U.S. district judges, U.S. magistrate judges, or U.S. probation officers, pursuant to legislative authorization that has yet to be drafted.¹² This assignment would mean

¹¹ 18 U.S.C §§ 4201-4218 (1994).

¹² If magistrate judges were authorized to make the initial parole decisions, then 18 U.S.C. § 3408, which authorizes many of the criminal functions of magistrate judges, would have to be amended to provide that authority. If other judicial officers, such as probation officers, are given this responsibility, then 18 U.S.C. § 3603, which sets out the duties and responsibilities of probation officers, would require amendment to provide that authority and to provide probation officers with the quasi-

that the parole hearing caseload generated by some 6,365 old law prisoners confined in Bureau of Prisons (BOP) facilities (in fiscal year 1997) would have to be assigned to the various district courts, with the consequent logistical problem of providing hearings for prisoners in facilities of all different security levels throughout the BOP system.

The most straightforward logistical solution would be to assign parole hearings to the district court nearest to the BOP facility in which the prisoner is confined. However, old law federal prisoners are concentrated in a limited number of BOP facilities that are typically not located in judicial districts that are adequately staffed to handle a caseload of parole hearings. A major U.S. penitentiary located in a rural district, for example, would present a hearing caseload that would certainly require the assignment of resources from outside that judicial district. Some judicial districts have more than one BOP facility located within the district and would have a far greater number of hearings than they could absorb with existing personnel.

The Parole Commission's workload statistics show that a projected 2,403 parole hearings will be conducted in fiscal year 1997. The anticipated workload will fall to 1,754 hearings in fiscal year 1998, to 1,245 hearings in fiscal year 1999, and to 859 hearings in fiscal year 2000. Although the number of hearings would be steadily decreasing, each hearing by a judicial officer would still require either: (a) prisoner movement to a courtroom; or (b) travel by a judicial official to a federal prison. Thus, there would be substantial administrative burdens imposed in travel alone. These consequences are in addition to the substantial time diverted from other judicial duties that would be needed to prepare for and conduct the hearing itself. Moreover, in addition to parole hearings, each year a substantial number of "record reviews" would become the responsibility of the courts. These typically involve a review of the release date due to new information received by the Commission concerning an inmate's disciplinary record or need for special conditions following release from the institution.

Under present procedures, if a judicial decision is required for a convicted federal prisoner (e.g., a resentencing), the U.S. Marshals Service transports that prisoner and holds the prisoner in a local jail facility pending the hearing scheduled by the court. Once the hearing is concluded, the prisoner is transported back to the designated BOP facility. Although following this procedure for parole hearings held by U.S. district judges or U.S. magistrate judges would be the normal judicial expectation, because it would economize limited judicial time, it would pose an immediate and costly burden upon the U.S. Marshals Service. **Based on its current practices and expenses, the U.S. Marshals Service projects it would cost nearly**

judicial status that would be necessary for them to be shielded from inmate lawsuits seeking to impose liability for wrongful parole denial.

\$14 million in fiscal year 1997 alone just for the transportation of prisoners to their parole hearings (including transportation and housing costs and salaries and related expenses of U.S. Marshals Service personnel) (see Appendix for additional detail). The Marshals Service anticipates it will require almost \$41 million over the next four years for all the costs that would be associated with these additional responsibilities.

Any anticipated savings to the taxpayer achieved by the elimination of the Parole Commission would certainly be partially or fully offset by the increased transportation and security costs imposed upon the U.S. Marshals Service alone, as well as by the cost of necessarily maintaining an office to schedule and coordinate these prisoner movements with judicial schedules.

An alternative approach of requiring judicial officials to visit federal prisons to conduct these hearings is even less feasible. There would be increased travel and security costs plus lost time when other court business would be delayed or suspended. Direct costs and the loss of judicial resources would also be in the millions of dollars and would increase court backlogs.

Furthermore, even if the task of conducting hearings were to be performed by the various districts, as stated above, a separate office would have to be established just to receive and maintain more than 26,000 active parole files,¹³ to determine when to schedule parole hearings, to keep track of the location of each prisoner because prisoners are often transferred from one prison facility to another, and to coordinate the assignments of judicial personnel to conduct the necessary hearings.¹⁴ The automated case tracking system used by the Parole Commission would have to be adapted or duplicated and an automated linkup with the district courts would have to be established. A central office would also have to possess sufficient expertise in parole laws, procedures, and guidelines to ensure the proper implementation of a function to which the judiciary is entirely unaccustomed.¹⁵ This would include, for example, responsibility for ensuring prehearing document disclosure required by 18

¹³ This number includes persons who are not under supervision or incarcerated in federal facilities, i.e., deported aliens who are still on parole and offenders serving state sentences with outstanding parole violation warrants.

¹⁴ Witness protection cases, for example, require a secure, centralized tracking system. There are 220 "old law" witness protection cases at present.

¹⁵ For example, states may request a jurisdictional transfer to the federal government of a state probationer or parolee who needs protection under the witness protection program (18 U.S.C. § 3521 et. seq.). The Parole Commission supervises state offenders after they are transferred to federal jurisdiction (18 U.S.C. § 3522(c)).

U.S.C. §4208(b). Each case would have to be prepared by competent staff, located in a central office or in the districts, and presented to the decisionmaker in advance of the hearing to be conducted.

Section 4203 of title 18, United States Code, sets out the procedures by which the Commission conducts its business. Within the judiciary, it would be difficult to recreate the kind of policymaking body with the procedures that govern the Parole Commission. Any transfer legislation would have to re-assign from the Parole Commission the function of promulgating rules and procedures and amending current regulations in response to legislation, appellate court decisions, or detected ambiguities.

Finally, any transfer of the Parole Commission's function to district court judicial officers must be drafted to avoid parole hearings by the judicial officer who originally sentenced the offender. Congress has had a longstanding policy in favor of finality in sentencing. As the Supreme Court noted in United States v. Addonizio:¹⁶

Whether wisely or not, Congress has decided that the Commission is in the best position to determine when release is appropriate, and in doing so, to moderate the disparities in the sentencing practices of individual judges. The authority of sentencing judges to select precise release dates is, by contrast, narrowly limited: the judge may select an early parole eligibility date, but that guarantees only that the defendant will be considered at that time by the Parole Commission. And once a sentence has been imposed, the trial judge's authority to modify it is also circumscribed.¹⁷

Any statutory amendment that permitted the original sentencing judge to conduct the parole hearing and set the release date of a prisoner would probably cause undue problems for federal prosecutors, who would be faced with relitigating issues and controversies that should otherwise have ended with the conclusion of the sentencing proceedings.

¹⁶ 442 U.S. 178 (1979).

¹⁷ Id. at 188-189 (citations omitted).

2. Imposing the Parole Release Hearing Function on Probation Officers Would Have a Detrimental Impact on Public Safety.

If the parole release hearing function were assigned to federal probation officers to make decisions or act as hearing examiners, rather than to judicial officers, it would divert resources from the supervision of offenders in the community. Already overburdened probation officers would have less time to supervise caseloads of released offenders. This would have a highly detrimental impact on overall public safety, unless Congress provided additional personnel.

Moreover, most incarcerated old law offenders are dangerous, long-term, or high-public-profile cases whose hearings require thorough preparation and experienced judgment. The role of adjudicator would be outside the scope of probation officers' training and current responsibilities.

As it now stands, no more than 77 percent of the required number of probation officers will be available to supervise the anticipated 88,000 offenders released to the community in 1996 and the anticipated 90,500 offenders in 1997.¹⁸ If officers are required to take on the additional duties of holding parole release hearings or condition modification hearings, there will, in effect, be a reduction in the ability of officers to adequately supervise offenders. Although probation officers would continue to prioritize the work and thus ensure full monitoring of the most dangerous offenders, potential consequences would include diminished collection of restitution and fines, reduced drug testing of released offenders, reduced ability to intervene at early signs of trouble, and possible increases in criminal behavior due to less frequent monitoring of offenders' circumstances.

C. The Transfer of the Parole Revocation Function to the Judiciary Would Be Inefficient and Would Create Higher Costs and Unnecessary Additional Burdens.

As noted above, the SRA provides that, upon the expiration of the Commission, persons on parole would have revocation proceedings conducted by a district court.¹⁹ Even this limited transfer of functions would present significant costs and administrative difficulties to the judiciary that would be avoided were the Parole Commission's term to be extended.

The transfer of functions would be an inefficient use of scarce resources. The Commission estimates that 6,336 persons will be on parole as of November 1, 1997,

¹⁸ At the current funding level, probation offices are staffed at 84 percent of position requirements, according to the applicable work measurement formula. However, at this overall funding level, only about 77 percent of the positions required specifically for the supervision of offenders are actually available.

¹⁹ See Sentencing Reform Act, *supra* note 2, at § 235(6)(3) and (4).

and these cases could generate more than 2,000 revocation hearings in the first year the judiciary would assume responsibility for the functions, and more than 5,600 hearings in the five-year period from fiscal year 1997 to fiscal year 2002.

The adjudication of parole violations would have to be conducted not only with traditional due process procedures but also in accordance with applicable parole guidelines. Pursuant to 18 U.S.C. § 4206, the Parole Commission has established a body of guidelines governing parole violation behavior that have the force of law, which the court would have to observe in revocation proceedings.²⁰ District judges would have to conduct these hearings unless legislation were enacted giving magistrate judges the authority to conduct them. These revocation standards for parole are unfamiliar to the judiciary and would have to be learned and applied. This new and unfamiliar duty would be burdensome to assimilate, especially when added to the burden of new supervised release (the SRA approximation of parole) cases.

Most importantly, the implementation costs incurred by the judiciary would be significantly greater than the projected costs of simply maintaining the Parole Commission for a few more years to perform the same function (see Appendix). For example, the Commission has produced significant savings for the U.S. Marshals Service by holding most revocation hearings at a single Federal Transfer Center operated by the Bureau of Prisons. These savings would be lost if arrested parole violators had to be confined locally for district court hearings.

D. Shifting Prisoner Appeals from the Parole Commission's National Appeals Board Would Simply Impose the Expense and Burden of Addressing Prisoner Complaints Onto the Courts or Would Require the Re-Creation of Another Review Process to Resolve Prisoner Appeals.

The provisions of 18 U.S.C. § 4215, which deal with appeals from initial parole decisions, would have to be completely rewritten. There currently exists a right to review whenever parole release is denied, parole conditions are imposed or modified, parole discharge is denied, or parole is modified or revoked. Appeal is to the National Appeals Board, which is made up of three U.S. Parole Commissioners designated by the Chairman of the Commission. This process resolves many prisoner complaints and reduces the subsequent burden on the district courts to review challenges in the form of petitions under 28 U.S.C. § 2241.²¹ If, in connection with a transfer of the parole function, Congress amends the statute to dispense with the administrative appeals process, this would only shift the burden of addressing prisoner complaints onto the district and appellate courts. Prisoners would file petitions for writs of habeas corpus under 28 U.S.C. § 2241 to challenge a revocation or denial of parole and could appeal any final district court order upholding the challenged

²⁰ See 28 C.F.R. §§ 2.23, 2.40, 2.44, 2.48, 2.50, and 2.52 (1994).

²¹ In fiscal year 1995, the National Appeals Board received 1200 appeals, and the district courts received 636 habeas petitions under section 2241.

decision to a federal court of appeals.

The re-creation of a review process to resolve prisoner appeals in an orderly manner would be possible for the review of parole revocation, which is built into the procedure for revocation under Rule 32.1 of the Federal Rules of Criminal Procedure. The structure required for review of other parole decisions would be governed by the legislative choices regarding the conduct of the initial hearings. If the hearing responsibility were assigned by law to existing judicial officers, district judges might review magistrate judge decisions. If the hearing responsibility were assigned to a special parole entity within the judiciary, a body similar to the National Appeals Board would have to be created within the judiciary to maintain some degree of uniformity in the way the parole function is implemented. This approach, however, would in essence require an entire special court of appeals with all of the support services necessary for such a court. The Judicial Conference of the United States has generally opposed specialized courts within the judicial branch.²² In any case, the appellate courts would be faced with a new burden unless Congress specified that a district court or other reviewer's decision was final and non-appealable. If Congress does nothing with respect to this issue, it must be assumed that these decisions are "final decisions" and subject to appeal under 28 U.S.C. § 1291.

E. Application of the Parole Commission's Regulations Would Require an Ongoing Training and Support Function, Which Would Be a Significant Additional Burden and Expense to the Judiciary, Especially in Light of the Large Number of Judicial Personnel Required to Carry Out Parole Commission Functions Nationwide.

As indicated above, any judicial officers or employees performing Parole Commission functions would have to perform those functions using Commission regulations. The Parole Commission and Reorganization Act²³ contains a basic set of requirements for the implementation of the federal parole function that must continue to be observed in order to maintain an old law offender's basic eligibility for parole.

The Parole Commission has established a body of regulations that have the force of law and would have to be observed by any court, agency, or office charged with administering the federal parole function. These include the guidelines at 28 C.F.R. § 2.20 which are mandated by 18 U.S.C. § 4206. There are also guidelines for evaluating parole violation behavior, guidelines for evaluating prison misconduct, guidelines for evaluating prison program achievement, guidelines for evaluating

²² See September 1986 Report of the Proceedings of the Judicial Conference of the United States, p. 60; September 1962 Report of the Proceedings of the Judicial Conference of the United States, p. 54; Recommendation 16, Long Range Plan for the Federal Courts (1995).

²³ 18 U.S.C. §§ 4201-4218 (1994).

cooperation with law enforcement authorities, and guidelines for granting early termination of parole supervision.²⁴

The application of these laws and regulations by judiciary staff would require a significant amount of training given the large number of judicial personnel that would be involved in performing the Commission's functions. At parole hearings, prisoners could be expected to raise challenges concerning application of the Commission's guidelines, and the official presiding at the hearing would have to resolve them. This would require some advanced training on the part of those preparing for the hearings and, depending on who would be conducting the hearings, a briefing on the issues to be presented. This training and briefing function may be compared with the administration of the sentencing guideline system and with the ongoing training and information functions of the United States Sentencing Commission.

As described previously, although some districts would receive disproportionate numbers of parole hearings, nearly every district would have to expect to handle at least a few, especially if a parole-eligible individual were being held in a state or local facility as opposed to a federal institution. Thus, it would be necessary to ensure that there would be sufficient judicial officers and other personnel trained in the guidelines and controlling precedents in each and every district to handle whatever parole-related matters happen to arise. Therefore, hundreds of individuals would require extensive training at costs that could easily run into millions of dollars.

The laws and regulations applied by Parole Commission hearing examiners are subject to a significant degree of administrative interpretation and control from the Commission in order to maintain the "national parole policy" required by 18 U.S.C. § 4203. These essential features of the federal parole system make the extension of the Parole Commission's tenure the most straightforward method of ensuring that old law offenders continue to have their criminal sentences implemented according to the law annexed to the crime when committed.²⁵ It would be costly and inefficient to create a training and parole guideline interpretation function for federal judicial personnel nationwide.

F. Alternatives to Transfer of Parole Commission Functions to the Judiciary.

The most expedient and cost-effective means of ensuring performance of necessary, ongoing parole functions is a simple five-year extension of the Parole Commission to November 1, 2002, as proposed by the Department of Justice. A bill adopting this approach, S. 1507, was passed by the United States Senate on December 22, 1995. The Judicial Conference of the United States, pursuant to a recommendation of the Federal Courts Study Committee, has endorsed the

²⁴ See 28 C.F.R. §§ 2.21 through 2.63 (1994).

²⁵ See Warden v. Marrero, 417 U.S. at 657-664.

continuation of the Parole Commission. It would allow the Commission to carry on its work efficiently, necessitating no additional costs or burdens to any other agency, while simultaneously allowing the Commission to continue its steady downsizing of operations in tandem with the shrinking population of parole-eligible persons.

An extension of the Parole Commission by five years makes extraordinary practical sense. In five years, the problems with parole-eligible prisoners will be far different than they are today. Because of the diminishing number of parole-eligible prisoners, it will be far easier to predict the solution necessary to deal with them. At the end of fiscal year 1996 there will be approximately 6,723 parole-eligible prisoners. Many of these will need new release dates before they serve their complete sentences. Although some additional parole-eligible inmates will continue to enter the system, in five years the number will be down to 2,131 incarcerated inmates, many of whom will be reaching the end of their terms. Accordingly, the most reasonable approach is simply to extend the Parole Commission's tenure.

Another solution, although not as immediately expedient and simple, would be the creation of a successor agency or office within the executive branch to continue to provide the services of the Parole Commission. Such a solution would make the most sense if the successor were located within the Department of Justice, where the Commission is currently administered. While not as immediately preferable as an extension of the Commission itself, this approach would alleviate the problems of trying to fit what was designed as an executive branch function into the judicial branch. If accompanied by a transfer of the existing essential and already well trained personnel, it would avoid the cost and inefficiency of re-creating the systems and expertise of the Parole Commission in a different branch of government.

IV. CONCLUSION

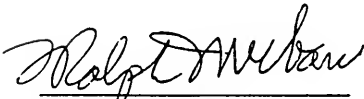
Ongoing parole functions are constitutionally required and must be performed even if the Parole Commission is allowed to expire. It is clear that the transfer of such functions to the judiciary would be, at the very least, extraordinarily cost inefficient and would not result in savings. Indeed, the transfer of parole functions to the judiciary would actually increase the overall costs of performing essential Parole Commission responsibilities, imposing significant costs upon the judiciary and/or the U.S. Marshals Service. Moreover, the transfer would have a detrimental impact on public safety and would potentially create security risks for judicial officers.

A transfer of parole functions to the judiciary would also require extensive and meticulous revisions of numerous affected statutory and administrative provisions. Application of the Parole Commission's regulations by the judiciary would require ongoing training and support which would be burdensome and expensive.

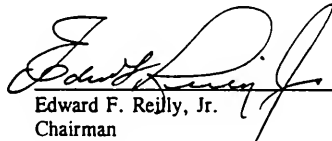
The most expedient and cost-effective means of ensuring the performance of necessary, ongoing parole functions is a simple five-year extension of the Parole Commission to November 1, 2002. This approach is supported by the Department of Justice and the United States Judicial Conference, and legislation adopting this approach has been passed by the United States Senate.

For all the reasons stated in this joint report, the Administrative Office of the U.S. Courts and the U.S. Parole Commission strongly recommend that the House of Representatives adopt the approach taken by the Senate and extend the Parole Commission for another five years.

Respectfully Submitted,



Leonidas Ralph Mecham
Director
Administrative Office of the
United States Courts



Edward F. Reilly, Jr.
Chairman
United States Parole Commission

APPENDIX**Detailed Impact Analysis of Various Options
Related to the Transfer of Parole Commission Functions**

This impact analysis reviews the potential resource and cost implications associated with the various options related to the possible transfer of the Parole Commission's functions, as detailed in the main report.

Option: Authorize the Parole Commission for an Additional Five Years

Extension of the Parole Commission for an additional five years (until November 2002) would represent the most efficient and effective option. The Parole Commission has already incorporated its forecasts of a steadily decreasing workload by projecting gradual decreases in required funding levels for the next few years: initially projected funding levels drop from \$5.4 million in fiscal year 1996 to about \$1 million in fiscal year 2001 (adjusted for inflation). **Therefore, the cumulative total of the Parole Commission's budgets for the next five years would likely be no more than \$22 million.**

If this option is chosen, significant expenses or efficiency losses related to a formal transfer of duties or an administrative relocation would be avoided. No additional training or education costs would be incurred. General overhead and operating costs would continue at the relatively low projected levels.

Option: Transfer the Parole Commission into the Department of Justice

This option would transfer the Parole Commission as a self-contained entity into the Department of Justice. This option would likely not cost anything more than the previously-discussed option to extend the Parole Commission in its current form for another five years. The Department of Justice already provides significant administrative support to the Parole Commission (e.g., budget submission, payroll processing, personnel support). This approach would not require a statutory transfer across branches of the federal government, which would otherwise incur significant administrative costs. It would also not entail substantial legislative effort to ensure a stable transfer and full legal compliance with all statutory requirements associated with parole proceedings.

**Option: Distribution of Parole-Related Duties Throughout the Judiciary
(Judicial Officers and/or Probation Officers)**

This option would disperse all parole-related duties throughout the federal district court system. This alternative would be the least efficient and most expensive course of action.

The Parole Commission has already streamlined its functions and personnel requirements to meet its responsibilities in a highly efficient and cost-effective manner, taking greatest advantage of its considerable in-house expertise, specialized staff roles, and relatively minimal overhead costs. As discussed below, given the judiciary's personnel and operational structure, it will likely prove impossible to reproduce the Parole Commission's efforts and achievements in these areas if the parole functions are dispersed throughout the entire federal court system.

Breakout of Potential Impact on Various Major Cost Categories:

Compensation: There are several legal and policy questions that need to be answered regarding what judicial officers or personnel would be assigned which of the parole-related duties. For example, it is unclear whether or not magistrate judges would be primarily responsible for conducting hearing examinations, with their actions reviewed by district judges, or whether probation officers would act as the initial hearing examiners and processors of the majority of administrative actions, with their decisions to be reviewed by magistrate or Article III judges.

Regardless of which alternative would be chosen, the related salary costs would be greater than that which would be incurred by the Parole Commission. Parole Commissioners currently receive \$108,200 in salary, and the chairman receives \$115,700. In comparison, district judge salaries are set by law at \$133,600, while magistrate judges receive \$122,912. Thus, considering only the initial review function, the related compensation costs for the required personnel (regardless of whether district or magistrate judges are responsible) would be at least 10-25 percent higher if this option were imposed. If magistrate judges are assigned the task of performing all parole hearings, the associated costs will be several times greater than the costs currently incurred by the Parole Commission's hearing examiner staff.

Operating and Overhead Costs: If additional court personnel were authorized to perform the parole function, then this option would also result in dramatically higher operating and overhead costs, in comparison to those currently incurred by the Parole Commission. Judicial officers, court staff, and probation personnel are almost always housed in courthouses located in central city locations. The General Services Administration (GSA) charges commercial market rate rents reflecting the location of these courthouses, the specialized facility requirements, and other operating factors associated with these sites. These GSA rent charges are likely to be much higher than those assessed for the conventional office space currently occupied by the Parole Commission, located in an area outside of the immediate downtown Washington, D.C. area.

Training: Since the Parole Commission has not recently hired personnel, education expenses have been minimal. In recent years, it has generally relied on the expertise and experience of its longtime personnel to conduct in-house education and training programs for new personnel or for continuing education.

The transfer of parole-related responsibilities would require the extensive training and education of judicial officers and employees in the parole statutes, Commission guidelines, and Commission decisions, with which most members of the judiciary have had little or no experience. An extremely intensive and immediate education process would be required during a very short time period before any anticipated transfer.

Assuming this training could be accomplished even within a one-week training session, the costs would still be substantial. The Federal Judicial Center reports that a one-week education program would cost about \$1,250 per individual. This individual total represents per diem lodging and food expenses, transportation costs, trainer compensation, facility and other administrative support costs.

The total training costs can be significant considering the number of judicial officers and court staff that would have to be trained. Parole Commission data suggest that the majority of parole hearings would disproportionately impact about 40 federal district courts (principally those containing large federal correctional institutions). However, many more districts, if not all, would still have to expect and be able to process at least a few parole-related proceedings. For example, about 10 percent of parole violators are housed at state and local facilities scattered throughout the country.

If, in the 40 districts that are likely to handle the majority of parole proceedings, at least five judicial officers and personnel would require such extensive training, and, in the remaining 54 districts, at least three judiciary representatives would also need some level of education, this would mean that at least 362 judges/court staff would have to attend a training seminar. Based on the Federal Judicial Center's estimate of \$1,250 per attendee, training costs in the first year alone would be more than \$450,000.

These training costs do not include the resource value of the lost time spent during the training process. These resource costs alone could run into the millions of dollars, depending on the actual mix of individuals attending the seminars.

Transportation of Prisoners for Parole Hearings: After a review of the various proposals associated with this report, the U.S. Marshals Service (USMS) estimated that it could incur as much as \$41 million over the next four fiscal years in transportation, housing, and staffing costs related to the transfer of prisoners for parole hearings. In developing this estimate, the USMS first recognized that, within any court district, parole violation hearings are likely to be short in both duration and frequency, as compared with other cases. Further assuming that parole hearings would be held in many different judicial districts and by many different judges and that judges would expect that parolees would be expeditiously brought into court, the USMS acknowledged that its workload would be significantly increased.

Recognizing that it is practically impossible to determine accurately exactly how many prisoners would be traveling from any particular correctional facility to any specific courthouse, the USMS used national cost averages. Based on the number of hearings projected to be required in fiscal year 1997 (3,356), multiplied by the average round trip cost for the USMS National Prisoner Transportation System (using the most recently available fiscal year 1994 figures), transportation costs are expected to total at least \$1,879,360. The average length of stay for parole hearings was assumed to be the same 45 days, as presently encountered at the Federal Transfer Center. (The 45-day figure actually contains 30 days of USMS costs and 15 days of Bureau of Prisons (BOP) costs, but for this computation they are combined.) In the fiscal year 1995 budget request to Congress, the average USMS housing cost was estimated at \$58.41 per day. Using this estimate, the fiscal year 1997 total for housing would be \$8,821,078.

Furthermore, the USMS acknowledged that each of the 280 court cities has different logistical solutions to complex sets of daily transport requirements. In order to ensure adequate staffing, the USMS assumed that the 25 cities where the bulk of parole cases occur would each require an additional full-time equivalent (FTE) position to administer and process this increased workload. Using an average salary, benefit, and overhead cost of \$130,941 (GS-12) per FTE, the USMS estimated that an additional \$13,094,125 just for staffing resources would be required over the next four years.

The following chart uses the above formulas and projects the figures for the Parole Commission's estimated caseloads for the fiscal years 1997 through 2000. It also includes estimated salaries and related expenses for USMS personnel.

Projected U.S. Marshals Service Costs:

<u>FY</u>	<u># of Parole Hearings</u>	<u>Transportation Cost</u>	<u>Housing Cost</u>	<u>Salaries, etc.</u>	<u>Total</u>
1997	3,356	\$1,879,360	\$ 8,821,078	\$ 3,077,075	\$13,777,513
1998	2,450	1,372,000	6,439,703	3,240,825	11,052,528
1999	1,739	973,840	4,570,875	3,338,050	8,882,765
2000	1,200	<u>672,000</u>	<u>3,154,140</u>	<u>3,438,175</u>	<u>7,264,315</u>
Totals:		\$4,897,200	\$22,985,796	\$13,094,125	\$40,977,121

Transportation of Judicial Officers and/or Other Court Personnel to Prisons: The alternative to the transportation of defendants to courts for their hearings would be for judges, probation officers, or other court personnel to travel to individual prisons when necessary. Given the enormous safety problems that would be generated by this option, the USMS indicated that such

a proposal should not be considered and did not develop transportation and security cost estimates.

Even excluding the USMS's costs, the judiciary would lose the equivalent of thousands of "court days" (and millions of dollars of judicial resources) if judicial officers or other court personnel were required to travel to federal prisons.

Centralized Administrative Requirements: Even if the task of conducting hearings is to be performed by the various districts, it is likely that the judiciary would have to establish a separate office just to receive and maintain over 26,000 parole files, to determine when to schedule parole hearings, to keep track of the location of each prisoner (because prisoners are often transferred from one prison facility to another), and to make the assignments of judicial personnel to conduct the necessary hearings. This office would also have to maintain sufficient expertise in parole laws, procedures, and guidelines to ensure the proper implementation of a function to which the judiciary is entirely unaccustomed. (There is no correlation between the sentencing guideline system and the parole system.) It would also be necessary to develop a computer system to assist efforts to track prisoners and schedule hearings.

It is likely that the costs associated with this central coordination process would be similar to the related administrative costs currently and anticipated to be incurred by the Parole Commission. Based on this assumption, the judiciary would need to assign about 20 FTEs, at a cost of at least \$1 million in fiscal year 1997, although this cost would be expected to decrease in following years as overall workload levels continue to decline.

Mr. MCCOLLUM. Thank you, Mr. Reilly.

I don't want to prejudice one of my colleagues, but I am under the impression at the moment that, first of all, old-law prisoners are going to continue for some time and that in order to comply with constitutional concerns as well as with pragmatic concerns, that we are going to have to continue to have a way to deal with those old-law prisoners and we certainly are not going to wind up with the kind of thing I guess was originally contemplated when the Parole Commission sunset was set years ago.

And I am sympathetic to the concern that judges shouldn't be spending the time when the numbers are as high as this, and maybe there isn't even a constitutional problem for them doing it, but I am rather disturbed by the idea that we would continue for actually a third time to address this problem, then come back again in the year 2002 with it unresolved.

I would like to believe this committee and this subcommittee could resolve the issue with some degree of certainty and finality in this session of Congress.

I am a little curious with the numbers of prisoners that are actually involved in all of this. I know Judge Arcara said back in this year there are 6,723 parole-eligible prisoners, and I believe both Mr. Reilly and you said there are 20,131 incarcerated inmates.

I believe, Mr. Reilly, you said counting those who are out there in parole, there are some 5,000 now that are either under your supervision or subject to being reviewed, together, cumulatively, that will be around in the year 2002.

What—I am curious about, how does this compare to what it was like back in 1990 or 1992 when the law was changed last? Do you know what the numbers were back then—how many people were being supervised and incarcerated?

Mr. REILLY. I really don't have that figure in front of me, Mr. Chairman. I do have figures from 1995 forward, but I don't have the 1990 or 1992. Possibly Counsel Stover, who was here, our legal counsel, might be able to respond to that.

Mr. MCCOLLUM. Substantially larger, and those numbers will be provided to us.

[See appendix, p. 65.]

Mr. MCCOLLUM. We are on a big down trend here. But if you have 5,000, one way or another, to look at in 2002, who is to say the Parole Commission shouldn't be extended further than 5 years? What is magic about 5 years?

If we are going to do something more with the Parole Commission, would it be more manageable at that point to request, Judge Arcara, the judicial system handle it then? If they can't handle it then, will there ever be a point where it can handle it? Those are the questions out here on the table.

I want to ask you that first, Judge, since the ball is over in the judicial court with respect to the current law.

Judge ARCARA. I asked the members of the Judicial Conference. I asked, how should I respond where we are going to be 5 years from now? Are we going to be back doing the same thing 5 years from? Now it is apparent to the Judicial Conference that the numbers set forth in the judicial report would be more manageable. Certainly we would not oppose—and I am saying this now I believe

on behalf of the Conference—that 5 years may not be enough. It may be more realistic to add 2 or 3 more years to this process.

Mr. MCCOLLUM. At some point in time is there going to be a day when the courts could, under the kind of proposed current structure in law, take over this function for old-law prisoners, or will there always be such a great problem or great additional cost that you wouldn't want to do it even if it gets down to 1,000 or 1,500 or something.

Judge ARCARA. I think when we get down to a number it will be manageable, maybe 3, 4, 500 hundred, somewhere in there, where the judiciary could take a look at this and put together some logistics and assign maybe a judge or two to handle this, some more specific way. But now, because the numbers are so great, it would not be feasible. It wouldn't be any cost saving at all.

I think if we were talking about a few hundred, it may be a realistic opportunity at this time for the judiciary to take over. First of all, we have no real expertise in this area. In fact, when I was trying to get into preparing for this, it was really the first opportunity I had to really get into the rules and responsibilities and functions of the Parole Commission.

Mr. MCCOLLUM. But if you start wearing that hat at any point in time, somebody is going to have to get trained in the current expertise of the current system, right?

Judge ARCARA. Yes, sir. But I think it will be manageable. Let's say you had a few hundred out there versus the thousands we are talking about now, that the judiciary could, if Congress felt appropriate, handle. We would prefer not to have it at all.

Mr. MCCOLLUM. Why couldn't we change the law—I am going to ask you and Mr. Litt this question. Why couldn't we change the law from what it is right now and next year, instead of having the system changed as it is going to be, simply put this parole function in the judiciary or under the Justice Department, and instead of having a Commission as exists today, have parole officers who do this job, so you don't have the question of the judges doing it or U.S. marshals running out and having to transfer prisoners around, as the report says, who are more expensive, but in essence taking over the State Parole Commission and having a board, perhaps under your supervision, under the Judicial Conference's supervision, or a court's supervision, however we structured it to handle it? Wouldn't that ultimately be more efficient if it is going to wind up in 2002 or 2005 being in your shop?

I can ask the same thing of the Justice Department. I am looking at the end solution and how do we best get to the end solution, and maybe we ought to shift this thing over in some portion or some format now. I am not quite sure how, but I am looking at structure.

Please respond to that. And, Mr. Litt, do the same. I will go to Mr. Scott or someone else.

Judge ARCARA. I think it would be inherently unfair to the judiciary to assign this responsibility to judiciary, certainly at this time. We have no expertise in this area. We would have to incur tremendous operating costs, training, educating judges. We would have 800 or 900 different judges possibly looking at these parole hearings—

Mr. MCCOLLUM. Excuse me, Judge, but even if we just sort of shipped over the current Parole Commission and say they are going to be housed over with you; instead of you being a separate Commission, you get the staff, you get the personnel, you hire the expertise; that is what I am suggesting.

Judge ARCARA. Mr. Chairman, what would be the end result in why would you want to do that, why would you want to shift that responsibility ultimately to the judiciary?

Mr. MCCOLLUM. Yes, I think would be more cost efficient. It couldn't help but be if, in the end, we are going to have you or the Justice Department or somebody else have the ultimate responsibility for old-law prisoners. At some point we are going to have to make that shift.

It seems to me having it under the house where it is going to end up sooner or later, it will wind up with efficiency in the situation. It seems like common sense to me. Maybe I am wrong.

Judge ARCARA. It seems to me the thought of this responsibility coming on the judiciary would be such an awesome addition, Mr. Chairman. I have right now over 650 active cases. I have 125 criminal cases. I have been involved in trials for the last 4 months nonstop.

If all of a sudden I had to divert my attention as an active judge into this area, which I am not familiar with at all, if I had to travel, we would have to bring in prisoners and disrupt trials. I just can't imagine how I will be able to do this. I just don't think it would be efficient.

I know nothing about the rules and regulations of the Parole Commission. I would have to familiarize myself.

You might say, well, you are doing that now, dealing with supervised release under the Federal Sentencing Guidelines. That is a whole different matter completely. Individuals are sentenced; they are on supervised release. Under the guidelines there are certain conditions and terms all within our district.

If there is an individual within our district that violates and he is brought back to court, he is assigned an attorney, he is entitled to a hearing, there is a preponderance of the evidence standard. We are familiar with all of this.

I am not familiar with how to conduct these parole hearings, how to conduct these revocation hearings, what is standard, what has happened in the past. There is a whole area of the regulations that have been applied for the last five or six decades by the Parole Board. They are familiar with these things.

Mr. MCCOLLUM. You would not want to be responsible for supervising a parole board that is within your house or shop?

Judge ARCARA. No. I think that there would be a sense of unfairness because many times if a parolee feels that somehow or other his due process rights have been violated, he always has recourse through the courts, and all of a sudden the courts—he may not feel that same way in the future if he felt the courts are supervising the Parole Board.

Mr. MCCOLLUM. I don't want to dominate the time. I would like Mr. Litt to respond with the same consideration to the Justice Department.

You have told us it is not efficient over there or any more efficient; certainly it didn't cost more; it won't save any money. Now, wouldn't it in the long run save money if you are going to house it? Ultimately someone is going to have to do it in the year 2002, 2003, or 2004. Do you think it should go to the courts or the Justice Department? What is your feeling about all of that?

Mr. LITT. I appreciate your question. I think it is the right question to be asking, to be looking down the road.

Let me offer just two observations. One, from the budgetary point of view, it seems to me that you will save money by postponing the transfer to some extent on the era of a declining workload.

If you imagine the need to train enough people in the judicial branch or in the Justice Department to handle Parole Commission hearings now when we have anticipated 300 parole hearings for the next year and you would have to train enough people to deal with that today, if you put this off a few years, you will be dealing with the need for a much smaller startup because you will be dealing with a smaller case load down the road.

So I think from a budgetary point of view there is an advantage, so to speak, in kicking the can down the road for a few years.

Mr. MCCOLLUM. Let me interrupt you by saying if you took on the money, some of it from the Parole Commission and the personnel in the Parole Commission, it doesn't really make much difference when in time you get this because you have the expertise. Presumably you can hire the people that are already doing the job rather than training new people.

Mr. LITT. That is where the "no savings" comes in. Because from a budgetary point of view they can do the job just as efficiently where they are now. The problem is, if you are looking towards an ultimate phaseout, where it is going to be phased out to.

Mr. MCCOLLUM. There would be some efficiency, too, presumably ultimately in overhead over the years in the staffing of the support team and so forth.

Mr. LITT. I think we actually do that already. The Department of Justice Management Division provides administrative support to them already. I think we have gotten the efficiencies we can already.

The other point I want to make is the point I made in the opening remarks. That is the perception of fairness issue. As I understand, the parole function many, many decades ago was within the Bureau of Prisons.

Back in the thirties, one of the reasons the independent Parole Commission was created was the perception that this decision ought to be made in other than the prosecutive department. I think there is real merit to that.

If you have somebody who is going to be deprived of his liberty, the process is going to be perceived as much fairer if it is made by somebody outside the Department of Justice, and I think that is an important consideration.

With respect to the issue of where the parole function ultimately ends up, if you have the decision ultimately made by the person who is the same Attorney General who is responsible for putting that person in jail to begin with, you are going to delegitimize the process to a certain extent.

Mr. McCOLLUM. Thank you.

Mr. SCOTT.

Mr. SCOTT. Thank you, Mr. Chairman. I have a couple of quick questions and some broader questions.

First of all, where are the hearings held now?

Mr. REILLY. The hearings now, Congressman, are held in the various institutions.

Mr. SCOTT. Some in the prisons?

Mr. REILLY. Some in the prisons.

Mr. SCOTT. How frequently is someone entitled to a hearing?

Mr. REILLY. If they have 7 years or less, it is every 18 months. If it is over 7 years, it is every 24 months.

Mr. SCOTT. Who hears revocation hearings?

Mr. REILLY. Hearing examiners. Our hearings examiners, of which we have five.

Mr. SCOTT. How often? What kind of caseload do you have on revocation hearings?

Mr. REILLY. This past year we had 2,500 actual revocations and a total of 4,162 hearings.

Mr. SCOTT. It seems to me that your—that in the cost of running the operation, the number of hearings that you have got is a dominant factor of the cost. I mean once you have a certain amount of cases, you can't get under a certain cost because you have a number of—what is the reasonable caseload for a hearing examiner? How many hearings can you get done in a day?

Mr. REILLY. We are trying to put a quota on our folks. We are telling them, depending on the case, of course, and we are assigning the most serious ones—these are ones that are very long-term offenders—we are saying they ought to do between 10 and 12 hearings a day. That is providing prehearing assessments are done and so on.

Several years ago—3 years ago, as a matter of fact—when I came, we had three other regional offices. We have people in these other areas, more people on the staff, 150 versus now 49. We have reduced significantly the number of people to do these hearings remaining.

Mr. SCOTT. How many people do you have doing the hearings?

Mr. REILLY. We have gone from a dual panel and we have implemented a single panel. Instead of having two examiners present, we went to one examiner.

Mr. SCOTT. Is the difference between the examiners and the Commissioner?

Mr. REILLY. Yes, sir. The Commissioners do not sit on any of the hearings, unlike in the State system. Commissioners ultimately make the decision here in Washington. The hearing examiner actually goes out, conducts the hearing, files a report that comes back to the Commission.

Mr. SCOTT. And most of your cost isn't hearing examiners?

Mr. REILLY. The big cost of this agency has been—and it is something we have really got a handle on—is the travel expense. It is sending people out all over the country to do these hearings, whether they have to go to the west coast—

Mr. SCOTT. So if you have got 5,000 hearings you are trying to get done this year, you can't save any money depending on where

you put this thing, because you have got the hearing examiner cost?

Mr. REILLY. Interestingly enough, let me say that we are, with the help of Bureau of Prisons and Director Hawk, we have done a lot of things very innovatively over the past 3 or 4 years. We have consolidated all the revocation hearings within the new facility in Oklahoma City that was built by the Bureau of Prisons. All of those are done in Oklahoma. We send one examiner down there, sometimes two, depending on the number of hearings they have to deal with. If it is a local revocation hearing, where it might be in California, we usually have to send an examiner out there to conduct the hearing because we are required to do so in a certain statutory period of time.

We have presently implemented an expedited revocation procedure, which is really an experiment, and it is working quite well, where we have a guideline of between 10 and 14 months. The Commission may offer to the inmate, say, 12 months—if you will accept 12 months and waive the hearing. We have already had, I think, close to 90 of those, and we have had about an 84 percent acceptance from the various inmates and attorneys.

All of these things that we have implemented to try to cut the cost of this operation to the agency and also retain our examiners in house to do prehearings and so on and get those done prior to going out to the hearings.

Mr. SCOTT. Mr. Chairman, the gentlelady from California has to leave, and I would like to yield.

Mr. MCCOLLUM. Oh, certainly.

Ms. LOFGREN. I just have one question.

One of the things we have done in California, and it has been a cost saver and has respected the due process rights of the individuals involved, is video arraignments, which have saved a lot of time from transferring personnel and flying them around. You can actually do full hearings, with counsel present, and I am wondering whether you have explored video hearings?

Mr. REILLY. I appreciate the question very much, Congresswoman.

We have explored it. We explored it the first year I was here. We met with a number of companies and received pricing and so on. We decided, in view of the fact that we were phasing down, the numbers of inmates were going down rather dramatically, and will go down, as you see, rather dramatically in 2000 even much more dramatically, that it was not cost effective for us in terms of doing it. But it has a tremendous application in many areas.

Ms. LOFGREN. Just a followup. Then I have a Technology Subcommittee hearing I have to go to. In California, at least, there are counties that have gone very heavily into it, and I am wondering whether it would be worthwhile to explore joint use of their videoconferencing capacity where you might have a really short trip with an individual for a parole hearing. San Diego, for example, has really gone into it and they are now loaning and jointly using facilities, for a small fee. It might help save some travel costs.

Mr. REILLY. We certainly haven't given up any idea to try to come with another innovative way to do this. Obviously we can

continue. I think I am known probably as a person who keeps bringing a change everyone day. In fact we were given the charge when I came in 1992 to downsize the agency and quite frankly get it to the point where we can shut it down. I don't think at that time when I came in anyone realized the it all.

In all the legalities of ex post facto clause and so on that has come back on the table, many times I have discussed it with the Department and indicated we needed to get something moving.

I discussed it with my brother-in-law who used to be a Member of Congress until a year ago, Mr. Slattery, and I explained to him very thoroughly what was going on in terms of the action that I was taking to downsize the Commission, and I offered him many of the options that you have mentioned, Mr. Chairman, and we have talked about here this morning, and also ran them by my wife also, who is a good advisor. They said to me, this is a shell game you are playing, you are talking about moving it over here and there and at that particular time I was advocating moving it in the Department of Justice. That is exactly what I was advocating, and they will tell you that I was.

And everyone said to me this was a shell game; you still have to do the process, get it down to the smallest possible number of people to do the process, and do it well with the people you have left, the competent staff you can retain. And, obviously, we have to be concerned about that because we have people who will be looking for jobs. If we lose those folks, we will have the Commissioners. I am not going to say that we are all that competent to do the hearings, but we will have Commissioners to do the hearings. It will just come to that.

We do have one Commissioner, Mr. Gaines, as Chairman of the Arkansas Board, who did do hearings. He is perfectly qualified. If he is trained by our folks, he could go out and do them. I don't think the other remaining three are particularly anxious about doing it, but if it could come to that, if we do lose some of the expert staff we do have, I think that is the issue. I think it has been summarized very well by the judge and by Mr. Litt.

The issue is, how do we do this and how do we bring it to a conclusion, Mr. Chairman? How do we do it in the most sensible and feasible way in terms of economics, in terms of costs to the taxpayer? And remembering in my 29 years as a member of the Kansas Senate, this was one the greatest challenges I could have taken on, was to come to Washington, be able to close something down, then go home and run for office and say I did this when I was in Washington.

There is only one thing I closed in 29 years in the Kansas Senate—we had a lot of them on the table—and that was the State Boxing Commission, and we still don't have any boxing going on that I know, but we were trying to regulate it back in those days. We were successful at that.

I would love to think we could bring this to a close today if we could. Unfortunately, the legality of the issue is on the table for the Congress to decide. I think there are some very innovative things we could all sit down and talk about between now and whatever date you decide you want to do this, but I have certainly been urging that in the past 3 years, that we go ahead and get something

in the hopper that will deal with it, whether it is going to the courts, whether it is going over to the Department, wherever you decide to put it.

I think in the meantime you have to be very cognizant to retain the competent people to do this work and make the decision if we have people fall through the cracks, and, as I said earlier, I am pleased with the success we have enjoyed. It is not because of me, it is because of a lot of good competent folks working there.

If we have people falling through the cracks, I am afraid we will all be reading in the papers about some embarrassing things about the U.S. function. So I don't want that to happen, and I say our ultimate goal is the public safety.

Mr. MCCOLLUM. Mr. Bryant.

Mr. SCOTT. Mr. Chairman, are we going to have another round?

Mr. MCCOLLUM. Yes, if you would like.

Mr. Bryant.

Mr. BRYANT of Tennessee. Thank you, Mr. Chairman.

Let me welcome this very distinguished panel. This situation you are describing appears to be a genuinely frustrating one for all of us. We are stuck with a set number of people who will have longer jail sentences. I assume most of them have longer jail sentences because they are dangerous and committed violent crimes. They are exactly the type of people we want to keep separated from law-abiding citizens, and we are trying to determine a way to do this in a cost-efficient way.

Commissioner, it sounds to me like you all have done an awful lot of things already to do this, and I commend you for that.

Would it be possible as a Congress—and I may direct this to the judge or to Mr. Litt in DOJ—the origin of this time schedule, I think you had mentioned if a prisoner has less than 7 years remaining, you have a hearing every 18 months, and more than 7 years, every 24 months. Have I got that backwards, the schedule of hearings? It is based on more than 7 years or less than 7 years remaining of a sentence 18 months or 24 months?

Mr. REILLY. If it is less than 7 years, we have to give them a hearing every 18 months. If they are serving more, we have to give them a hearing every 24 months.

Mr. BRYANT of Tennessee. The question I would direct to you, Judge, or Mr. Litt: Can we extend this period of time without violating ex post facto laws for longer periods of time between hearings?

Judge ARCARA. I don't believe you can. That is by statute.

Mr. LITT. I am hesitant to give an off-the-cuff opinion on the ex post facto clause. I think it would at least be troublesome because the premise of the ex post facto clause is that there are certain aspects of your sentence that are constitutionally frozen at the time of your sentence.

On the one hand, I could see that a court might conclude that extending the period from 24 to 36 months was not such a major change as to violate the clause. On the other hand, I think there is a substantial likelihood the court could say no, you are entitled to a hearing every 24 months, and that is what you would get.

Mr. MCCOLLUM. That is by statute we, as a Congress, enacted.

Mr. LITT. I think the eligibility is by statute. The prohibition on changing would be by the ex post facto clause.

Mr. BRYANT of Tennessee. In other words, we couldn't change it.

Mr. LITT. I am not referring—my opinion on that is I think there would be substantial problems.

Mr. REILLY. With your permission, can I call on our legal counsel?

Mr. BRYANT of Tennessee. Let me move on if I could. I would like to have his opinion on this, as I would like perhaps in writing any recommendations that you would make.

You alluded to earlier, just before our question about he might be willing to sit down and suggest some things that we could look at, I am convinced that we are all sincere on the question of how we can get there legally. It is frustrating. How can we get there?

Mr. REILLY. It has been frustrating, given the charge, as I said, very clearly, that Federal parole had been abolished in 1984 by act of Congress. And I think in the minds of everybody, very sincerely they believed that it was, just wave the wand, and that was the end of it, and there was no parole, and we wouldn't have to worry about these folks after a certain date. That wasn't the case because of the ex post facto clause, and it isn't the case again today.

Mr. BRYANT of Tennessee. Are we getting at these hearings the opportunity for legitimate input from victims of these crimes or at least that type of resource made available to the examiners of the hearings?

Mr. REILLY. Yes, sir, we are.

Mr. BRYANT of Tennessee. Judge, did you have a comment on something earlier?

Judge ARCARA. I was just concerned that any movement of the Parole Commission to any other judiciary or even the Department of Justice—certainly the operating cost would continue. I don't see how there would be any reduction in cost at all.

In fact, on the contrary, the cost would certainly increase, because there would be a lot of training involved, there would be educating involved, there would be a lot of other costs that I think would be required, and certainly there would be a reduction in the efficiency if there was a transfer. I think, in all honesty, the best place is to keep it right where it is right now.

Mr. BRYANT of Tennessee. Along that line, and again, probably because most of these people are dangerous, are they not pretty well consolidated already in prisons?

Mr. REILLY. I want to commend Director Hawk of the Bureau of Prisons, who is a close personal friend of mine and has worked very intimately with us in terms of trying to reduce the number of institutions to which the Parole Commission has to go, because obviously that is also a cost factor to us.

If we can go to Leavenworth, which is my hometown, and have 10 or 15 inmates there versus going out to Florence with one—I am just using that as an example, Colorado—it is obviously more cost efficient conducting 10 or 15 hearings versus going out to one institution.

So we have Consolidated—not we, the Bureau has, for us to try to put those folks who are parole eligible, old-law inmates in certain institutions so we know exactly where we are going. And they

have even cooperated to the point of, if we have them in Lewisburg and they are parole eligible, to move them closer to where we are, they will do so for us to conduct the hearings.

So we really had a tremendous cooperative effort with the Bureau, and I think right now we are down to around 48, 50 institutions where we are required to go, where there are these old-law inmates housed.

Mr. BRYANT of Tennessee. I see my time is up.

Mr. MCCOLLUM. Thank you, Mr. Bryant.

Mr. Watt, you are recognized for 5 minutes.

Mr. WATT. Thank you, Mr. Chairman.

I take it that each of these witnesses thinks that we ought to continue the Parole Commission as it currently exists and pass something similar to the Senate's bill, which is a 5-year extension of your life, and I guess that—I don't really have any question about our obligation and responsibility, legal and otherwise, to do that, so I don't want to go there.

So I am not sure I understand what the converse is here. We have an obligation to do something. Nobody wants to pay for it, but we have got the legal obligation. Most of what we do in the criminal justice system nobody wants to pay for, but we have got an obligation to do it if we are going to have any kind of legal system. So you kind of chase that tail around the circle for a long time.

I take it, it is possible, at least theoretically. And I understand that everything is theoretically possible. When you put it on the ground and try to do it, it doesn't always work out like that. We know exactly who have these people are who were sentenced under the prior law. How many of them are there? Do we know that? Has somebody done a study of that?

Mr. REILLY. Yes, we do we have the figures for you.

Mr. WATT. What their kind of life expectancies would be, I suppose.

I guess I am getting to the question: Is 5 years a long enough extension, or are we going to be back 5 years from now having another hearing like this?

Should we be talking about some longer period than 5 years as a realistic, practical matter, and are there still going to be a number of these inmates in this category even after the 5-year period? How many of them are there going to be, and should we be talking about doing this for a longer period of time?

Mr. REILLY. Let me respond, if I might, Congressman, to that.

I think that we are all as, Congressman Bryant said, frustrated by what to do. We have let the clock tick on this thing now without having addressed the 1990, I think, Judicial Improvements Act, which extended the Commission, and we are now back at the table with the same problem.

As I said in my earlier remarks, I think it is imperative that we, the Department of Justice and Parole Commission, the courts, and so on, work to come up with a responsible approach as these numbers diminish, and they are diminishing rather significantly out to 2002. As I indicated, they are down; they are down rather significantly.

To determine just exactly where these people should be placed, should it go to the courts? Obviously the judge makes a very per-

suasive argument at this point in time they are not in the position. And I listened to Mr. Meacum give testimony this year to the budget committee, and I would have to concur, as a former member of the State legislature, they are not in a position to take it on. He was talking about public safety and the probation parole officers. They couldn't do that and be diluted from the work of supervising offenders by virtue of running out to do hearings.

So I think what I am saying is, whatever has to be done, if it is a year, 2 years, or 3 years, in the course of that period of time, work with Congress to try to come up with some resolution that everybody feels they can live with, and whether that is going over to the Department, which I originally suggested and which for many good reasons Mr. Litt has expressed probably violates what was intended in the very beginning, which you did not want political manipulation of sentences and being able to influence, for whatever reason, someone's release.

So that is the reason that an independent quasi-judicial body was originally created under the Parole Reorganization Act. Quite a bit different from the thirties when the warden and the superintendent of prisons was making the decision as to who got out, the keeper of the keys, so to speak. It boiled down exactly to what you want to do physically with the people.

The judge makes a good argument. We can transfer those people over there; we can transfer them over there next week, our people, continue to do the role. However, you are dealing with a tremendous amount of statutory work here to put that into the language that guarantees everybody's right and doesn't provide for a glitch that these so-called jailhouse lawyers, who have been in for a long time and in some instances are more versed in the law than some of our own attorneys in our shop.

So I think it has to be done very carefully. I think there is a lot of thought that has to go into it. In the meantime, what do you do to avoid a jail break beginning of next year?

And I want to submit to the committee, Mr. Chairman, a letter I think I answered to Congressman Sanders the other day that I would like to leave with your staff.

Mr. McCOLLUM. Certainly.

[The information follows:]



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United States Parole Commission

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June 4, 1996

The Honorable Bernard Sanders
U.S. House of Representatives
213 Cannon House Office Building
Washington, DC 20515-4501
Attn: Christine Eldred

Re: Ernest D. Harvey
Reg. No. 97854-131

Dear Representative Sanders:

Reference is made to your letter of April 23, 1996 concerning the above named, a federal prisoner currently assigned to the U.S. Penitentiary, Lewisburg, Pennsylvania.

Mr. Harvey is serving a life sentence imposed in February, 1975 for Conspiracy to violate civil rights resulting in death and additional ten year sentence for interstate transportation of stolen property and illegal use of explosives. Mr. Harvey applied for parole in 1984 and received an initial parole hearing in April 1985. As set forth in a Notice of Action dated May 9, 1985, it was the Commission's decision to continue to a fifteen year reconsideration hearing in April, 2000.

Since his initial hearing, Mr. Harvey has had statutory interim parole hearings in December 1987, December 1989, December 1991 and July 1995. U.S. Parole Commission rules (28 CFR §2.14) provide for interim hearings at which any new and significant developments or changes in the prisoner's status that may have occurred subsequent to the initial hearing can be considered.

At the most recently conducted hearing in July 1995, the Commission's decision as set forth in a Notice of Action dated November 20, 1995 was for no change in continuing Mr. Harvey to a fifteen year reconsideration hearing in December, 2000. The offense behavior was rated as Category Eight, the most serious offense category, as it involved a homicide.

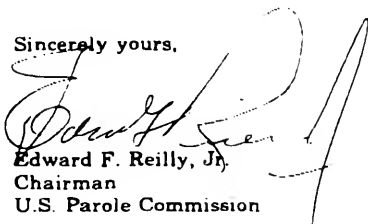
In the Notice of Action to Mr. Harvey, the Commission stated its reasoning for not reopening his case as follows: "...a finding has been made by the Parole

Commission at your hearing that no regulatory or procedural changes have been made by the Parole Commission since your last hearing which would positively affect your case in terms of Offense Severity or Salient Factor Scoring."

In his letter to you, Mr. Harvey raises the issue of the Commission's sunset date of November 1, 1997, and what will become of the "old law" inmates who are incarcerated after that date. Under the Sentencing Reform Act of 1984, the Commission is scheduled to terminate on November 1, 1997. However, there will still be a significant inmate population with a constitutional right (under the ex post facto clause) that must be provided periodic parole hearings as required by statute. In addition there remains a significant number of parolees under supervision that will require parole revocation hearings (and subsequent re-parole hearings). While the present statute requires the Commission to set "final" release dates for all remaining "old law" prisoners during FY 1997, setting of any such dates and required statutory interim hearings becomes problematic because of the ex post facto issue. To permit this function to be carried out after the sunset date, new legislation passed by the Senate (S.1507) in December 1995 and now under consideration in the House of Representatives would, if passed, provide a five-year extension for the Commission. A five-year extension of the sunset date as proposed in this legislation, would permit Congress the flexibility to consider more options concerning the Parole Commission's remaining caseload when the number of prisoners and parolees has declined appreciably.

I trust that the information provided will address your concerns. Your interest in this case of mutual concern is appreciated.

Sincerely yours,

A handwritten signature in dark ink, appearing to read "Edward F. Reilly, Jr.", is written over the typed name and title. The signature is fluid and cursive, with a large, sweeping "E" and "R".

Edward F. Reilly, Jr.
Chairman
U.S. Parole Commission

EFW/WPK

Mr. REILLY. Specifically on the issue of inmates, what we are being told by our examiners, that inmates refuse if they have to apply for parole; it is not automatic. It is a simple form, but they have to ask for it.

These prisoner are now saying, "We are not going to ask for a hearing," and they have been in a long time, and some of them maybe never did ask for a hearing because they say, "The Parole Commission is going out of business anyway on November 1, 1997, and we are waiting to file a motion and go to the courts," with the idea, they think—whether they can or not, I don't know; I am not a lawyer—but they think they can walk if they get before the proper court and they say you violated their constitutional rights.

Mr. WATT. My light has gone off, and I think you are giving us good information, but I still didn't get an answer to my question.

I take it, if I read between the lines of what you did say, if there was any revision we were going to make to the Senate bill, what we ought to be putting is an amendment to that bill which essentially says, study this issue and come back to us with a specific recommendation about how to address this problem; Parole Commission, study the issue, come back to us with specific alternative recommendations about how to solve the problem within 2 years or 3 years or whatever. That—

Mr. REILLY. I think we would all welcome the final resolution, as the chairman has said, of some kind, whatever it is. If the—

Mr. WATT. We would welcome that, but I still don't know whether a 5-year extension gives you a time frame that allows you to get all of these people out of the system. I mean, the system has to run its course. The people are still going to be there. A 5-year extension may not be enough. I don't know the answer to that.

Mr. REILLY. I apologize, I didn't get—I get off on my own legislative tangents.

Mr. WATT. We have all got our agenda around here. We can't be critical of you about that.

Mr. REILLY. I don't know what magical date there is. We have people right now—for example, there are people who committed crimes—

Mr. WATT. That is something that is theoretically possible to determine. We know the people who are in the system; right? We even know their projected life expectancy and all of that. That is something that is attainable theoretically, a piece of attainable information that we don't have before us as a committee, and it seems to me that we ought to have it, or you ought to have it, to make a recommendation, or two or three possible recommendations, about how to resolve this. And maybe at some point we will write something into the bill that says that, because right now we are just stop-gapping this thing, giving you 5 more years when we don't even know whether 5 years is enough or whether this is the best way to address this issue.

Mr. REILLY. I apologize, I didn't pick up on the question. My staff tells me that what you are really seeking is the numbers. I have the numbers in front of us, and today we have 5,000 prisoners that are parole eligible, that are still in the institutions, and we have almost 9,000 outside under supervision of parole.

Mr. WATT. Five years from now, how many will we have?

Mr. REILLY. Five years from now, we will 1,795 inmates incarcerated.

Mr. WATT. Ten years from now, how many?

Mr. REILLY. I don't have 10 years, Congressman. I am sorry.

Mr. WATT. We may be doing this stopgap, and we will be back here 5 years from now doing this again.

Mr. REILLY. I have seen cases that have dates on them. I have seen some cases.

Mr. WATT. Somebody will be though. Hopefully the judicial system will still be.

Mr. LITT. If I can offer an observation on this, nobody believes that we can or should keep the Commission in existence until the very last old-law prisoner dies or is released. I think what we are trying to do is balance the cost of keeping the function of an independent Parole Commission against the cost of moving it somewhere else.

I think our best judgment is to study that 5 years down the road. The caseload will be shrunk sufficiently so we will achieve economies by moving it somewhere else, which we wouldn't achieve by doing it today.

Mr. WATT. Mr. Chairman, I yield back.

It seems to me that marching 5 years down the road without having some mechanism for having a set of recommendations made to this committee or subsequent committees, or to Congress in general, about how to resolve this leaves us kind of flailing.

Mr. MCCOLLUM. Mr. Watt, I share that sentiment, and I think if at all possible we will attempt to resolve all of this in the next couple of weeks.

Mr. Chabot.

Mr. CHABOT. Thank you, Mr. Chairman.

My first question was similar to what Mr. Watt was getting at. How far out into the future are we still going to have people theoretically under the old parole system? How long are we going to be dealing with this in one form or another?

Mr. REILLY. You are speaking in terms of years of sentences of people that are in the system?

Mr. CHABOT. Yes. For example, under Federal law, some of these people are under life sentences with the possibility of parole?

Mr. REILLY. Yes.

Mr. CHABOT. Are there people without the possibility of parole as well?

Mr. REILLY. No, not under our old-law system.

Mr. CHABOT. Do you know what percentage under life sentence—how many of those 5,000 that you mentioned would, for example, be under life sentence without the possibility of parole?

Mr. REILLY. I don't have that figure in front of me, but I can get it for you. They tell me about 350.

Mr. CHABOT. 350, depending on how heinous these particular crimes are. Are those all murders? some kidnapping?

Mr. REILLY. It can be a variety of crimes.

Mr. LITT. They are serious offenders.

Mr. REILLY. Let me just run this for you. I do have some testimony that I used in the budget. Six hundred and forty-six were murderers.

Mr. CHABOT. 646 out the 5,000?

Mr. REILLY. 195 kidnapping; 169 rape; 1,153 robbery; 142 attempted murder or assault resulting in serious bodily injury; 19 aircraft piracy; 12 espionage; 656 were importation of for sale of one or more kilograms of pure cocaine; 134, importation of for sale of one or more kilograms of pure heroin; 90, importation of for sale of 20,000 pounds or more of marijuana; 159 theft or fraud offenses involving more than \$1 million. To give you a flavor of the situation, we can give you these figures.

Mr. CHABOT. I would assume it is safe to say some of these people are in their twenties and thirties perhaps, and for that reason, at least theoretically, maybe not even theoretically, some of these people may be incarcerated decades out into the future.

Mr. REILLY. Not really, Congressman. Remember, there is no one that has come in under us since 1987 unless if someone that has recently been caught or sentenced—for example, let me just use the Unabomber. I don't know what the U.S. attorney is going to with do about the Unabomber in terms of when they decide to charge him and under what statute, and some of the acts, I am sure they were before 1987—I remember them—were before 1987.

He may be charged under the old law, and, if convicted, he may be doing a dual sentence of both old law and new determinant sentencing, law so he will have really two sentences running, the old law sentence, then go to the new determinant sentence. It is possible.

Anyone convicted under the current investigations that are going on in Congress and various trials that just occurred recently where the defendants were convicted in Arkansas, we don't know where those people fall. I don't know.

Mr. CHABOT. My point is the ones that were convicted prior to 1987. So they are still under the old law.

Mr. REILLY. What I am saying is, we don't have too many 20 or 21 years old.

Mr. CHABOT. 30 years old a decade ago, committed in their twenties that are in their thirties now could live into their seventies or eighties. Who knows what? Some of these people we still may be dealing with way past the 5 years we are talking about here. OK.

I take it there is no dispute that the elimination of Federal parole and the adoption of the truth-in-sentencing was a step in the right direction. Are we pretty much in agreement that the old way of parole has a lot of disparities and just wasn't a very sound way to operate a criminal justice system?

Mr. LITT. Yes.

Judge ARCARA. Yes.

Mr. CHABOT. I am from Cincinnati, OH. The attorney general back in Ohio, Betty Montgomery, is at this time trying to implement a truth-in-sentencing in our particular State as well, not necessarily designed after the Federal system but at least to try to get rid of the disparities we have in some people getting out, paroling some people, and other people not getting paroles for very similar offenses and put the public at risk.

So I am sure they are going to study what has happened in the Federal system, but it is pretty much most people agree that getting rid of the old parole system was a good thing.

Would anybody want to comment on that?

Mr. LITT. I think we see a real benefit to a system where people serve the sentence they get. I think that that promotes, again, the same concern I mentioned before, the perception of fairness in the judicial system, and I think it promotes the confidence people have in the criminal justice system, to know if somebody gets a 5-year sentence they are going to serve 5 years in jail, not that they are going to serve 1 and two-thirds years and up to another body to determine what they are going to serve. I do think that is an advance in the system.

Mr. CHABOT. That is something the public has a right to and maybe will end some of the cynicism people have as to what actually happens. There is an assumption that people commit a crime and get out in a very short period of time. Maybe that was the case in the past.

Mr. ARCARA. Unfortunately, you still have that in the State systems though. So many prisoners or individuals are released after, let's say, a third, and people don't distinguish them from the Federal and State many times. It is: All the criminal justice system isn't working, people aren't fully serving the time. Then you have to go through the whole educational process. There is a difference within the Federal system, but it gets kind of lost out there.

Mr. CHABOT. As a matter of fact, when one considered crimes nationwide, those served under a Federal sentence are a relatively small percent of those nationwide. Most of the folks that are behind bars are under State law; correct?

Thank you very much.

Mr. MCCOLLUM. Thank you Mr. Chabot. Thank you.

Mr. SCHUMER.

Mr. SCHUMER. Thank you, and I want to thank the witnesses for being here, including my classmate.

I didn't see you at the 25th reunion.

Mr. LITT. No. My daughter graduated from high school this weekend. That took precedence, I am afraid.

Mr. SCHUMER. In any case, we all have similar questions. I don't know exactly what any of you would recommend we do after the next 5 years pass. It seems there is a consensus to extend the Commission as it is now. But there doesn't seem to be a clear-cut answer as to how to deal with the problem 5 years out, and we ought not wait for the next 5 years, as Mr. Watt said, to do it.

Does anyone have an explicit recommendation? Would it pay in our legislation to set up a little commission to study it and report back to us in a year, composed of people from the Judiciary, the Commission and the Justice Department? What explicitly would you each suggest?

Mr. REILLY. Congressman, that is exactly what I would suggest. I think that it is important that we bring together those folks who have an intimate role in this whole thing and make a decision. It isn't that we haven't been together. I sat on the Sentencing Commission also as an ex officio member and we have talked about this with them because they are very interested in asking about the

new guidelines and so on and very involved with the whole criminal justice system.

I meet with the Criminal Law Committee quite frequently whenever they are here in Washington. And I think if you would give the direction to us to sit down and come up with a resolution with this, working with the Department, we can do so and we can put this thing to sleep or to bed one way or the other, wherever it is supposed to go.

It obviously, as the judge has testified, will be much more manageable if the numbers are at that stage that I have expressed in 2002; they should be. But understand also that things are constantly changing in the Federal structure. We just recently received 500 military inmates that we didn't have from the disciplinary barracks at Fort Leavenworth, my hometown, because the military is talking about possibly getting out of the business. So they sent 500 over to the Bureau of Prisons.

That makes them all parole-eligible even though they were convicted under the legal—what is the law?

Judge ARCARA. Code of Military Justice.

Mr. REILLY. Code of Military Justice. But now they are parole-eligible and we are going to apply U.S. Parole Commission guidelines to 500 military offenders that were sent to us that are being put in the Bureau of Prisons. So all of these things are constantly impacting the system and that is all the more reason.

Mr. SCHUMER. To have this kind of thing.

Mr. REILLY. All of these people sit down—

Mr. SCHUMER. I would recommend that we do that, Mr. Chairman, that we set up something like this little Commission.

Mr. REILLY. That involves the Pentagon. They are involved in making those decisions.

Mr. SCHUMER. These are the kind of thing we couldn't come up with in a hearing, but I don't want to set up a big—

Mr. MCCOLLUM. If you would yield.

Mr. SCHUMER. Yes, I will yield.

Mr. MCCOLLUM. One of the questions I have, is this something we really need to study for a year or is this something if we said, OK, take the next 30 days or so and you all sit down and do it, let's get together, we could have a product? This is not a complicated bill. It is one that we could pass out of committee and full committee and the House floor probably if we could all resolve this in a matter of just a day or two, really, a week or two, literally. And so that is a question, I guess, you better tell us. But if we need to put it off to another Congress, fine. But if this is the bill, this is the freight train, this is the opportunity, we have got to do something now or it would be preferable for us to do something now, can we—can you get together that quickly, 30 days or so?

Mr. SCHUMER. He just wants to get it done while he is still chairman.

Mr. MCCOLLUM. Well, not necessarily. I intend to be around, chairman next time, too, but we will see, Chuck. I know you can do a fine job. You did it before, on this subject matter anyway.

Mr. LITT. Mr. Chairman, I think it would be preferable to deal with the present problem right now and give us more time to consider the problem in a little more considered manner. I am not con-

fident that within 30 days we could analyze all the possibilities and come up with an appropriate recommendation, and I do think it is important to get over the immediate problem that we have now, which is getting past the upcoming expiration date. So I would recommend that you give us plenty of time.

Mr. MCCOLLUM. One followup on this point and that is, what if we provided some mechanism in this bill that is self-executing to let you come up with a provision that we set up a structure, and I haven't done more than hypothesized this.

Mr. SCHUMER. Could we do that?

Mr. MCCOLLUM. Sure, we could do that. You know, with a—where it is decided by a panel of X, Y or Z and then it just—it just self-executes a year from now or 2 years from now or whatever. Any problem with that?

Mr. REILLY. I personally don't have any problem with that at all. I mean we are all reasonable folks who are trying to address the problem, the issue and still do it so we don't violate anybody's rights that are guaranteed to them.

Mr. MCCOLLUM. As long as you proposed it to us, we would have a chance to maybe act on it like we do today in some of the other laws that we have passed.

Mr. REILLY. Similarly.

Mr. MCCOLLUM. If we don't act within a certain period of time, I am saying—

Mr. LITT. You are talking about the equivalent of the Base Closing Commission.

Mr. MCCOLLUM. That sort of thing.

Mr. SCHUMER. Somehow, I think we have to come back and approve it, but that is another constitutional issue.

My next question is for Mr. Litt. What about the due process problem if we fold this into the Justice Department? The fact that the person at the top of the line, the Attorney General who is in charge of prosecuting, would then be in charge of paroling?

Mr. LITT. I am not—

Mr. SCHUMER. Do you see any due process problems?

Mr. LITT. I am not sure I would be prepared to go so far as to say there is a due process problem depending upon how you set it up. I think there were other examples where we have the adjudicative and the prosecutive function in the same body, but I do think that even if there is not a constitutional problem, there is a fairness and a perception problem that would counsel against moving it into the Department of Justice.

Mr. SCHUMER. And this is mainly perception? You said a fairness and a perception problem. The perception problem is pretty obvious.

Mr. LITT. Yes.

Mr. SCHUMER. Is there a substantive problem at all?

Mr. LITT. I would obviously have confidence in the Department's ability to make these decisions fairly, but I am not sure that everybody else would.

Mr. SCHUMER. OK. I saw Mr. Reilly shaking his head and agreeing.

Mr. REILLY. Well, I have great confidence in the Department.

Mr. SCHUMER. What do you think?

Judge ARCARA. As far as the Department, sir?

Mr. SCHUMER. Yes, as far as folding the Commission into the Department of Justice? Would you see that to be any kind of fairness problem?

Judge ARCARA. Well, I never really thought about it until it was just mentioned here today, and—because we put as part of our proposal that it was an alternative that we were suggesting.

Mr. SCHUMER. Right.

Judge ARCARA. Rather than consider the judiciary. I can appreciate the fairness issue. I can appreciate the perception that the inmates would feel, that here the keepers are the ones that they have to deal with as far as any parole hearings, and I think there could be a fairness problem.

Mr. SCHUMER. OK. And one final question deals with complaints that we occasionally hear about the Commission itself. So this is for the Chairman. That hearings are too pro forma, that even good cases can't get paroled. So I guess my two questions are: Is there any system of quality control to keep track of the work of the examiners? And second, what appeal, if any, do people on parole have from their determination? Seeking parole now, or denied parole.

Mr. REILLY. I appreciate the question. Every inmate has the right to appeal to the National Appeals Board, which sits here in Washington, which is part of the Commission. But those Commissioners and, of course, when we had seven Commissioners—now there are three—I have to serve actually on the panel now because we only have four Commissioners.

Mr. SCHUMER. What percentage of prisoners do appeal who are denied?

Mr. REILLY. In 19—fiscal year 1995, we had a total of 1,008 appeals. 89.5 percent of them, Congressman, were affirmed.

Mr. SCHUMER. So 11 percent were overturned. That is pretty significant.

Judge ARCARA. That is a better percentage than we get as district court judges, I think.

Mr. REILLY. Now, let me respond on the issue—you know, we are in a business. I guess I learned that when I was in the legislature. You are not going to satisfy everybody, and we are in a business that is a difficult one as we see the type of offenders that we see—that are coming before us, all of them extremely, in most cases extremely dangerous folks who have committed some very serious crimes.

In many instances what we found, and we had a case not long ago, a couple of months ago that involved some fraud and so on, but we have some very excellent, depending upon the individual's financial resources, the inmates' financial resources, we have some very wonderful and excellent attorneys who come before panels who represent those folks and they want to—in many instances, they are either new, the inmate has discharged his old attorney and/or it is the same attorney and they want to retry the entire case from the initial hearing that was given to the inmate when he first went in and they bring up the entire case again.

That is not, under our rules and regulations, allowed. When we see an inmate and they apply for parole, they are given a presumptive date. From that moment on, institutional conduct, what they

have done to excel, whether they have gotten a GED if they needed it, whether they have taken part in drug and alcohol counseling, whatever, all of those are a matter of record that go into the inmate file where they are incarcerated.

When we conduct future hearings, those are the items that we want to have to show that they are really committed to trying to reform themselves; or if they needed counseling, to get it or education to get it and so on. But to have these folks come in and try to relitigate this from the beginning, the entire case, is not allowed. We don't allow it.

In so many instances, most of those who defend these folks are not real happy about the fact that they can't bring up a volume of material that has previously been considered. We try to be very fair and we indicate always to the inmate, you are not happy with whatever the decision the Commissioners make, you certainly have the right to appeal that to the National Appeals Board, and I have just told you what they have done.

So the quality control issue is something that I have been very concerned with since I came. We very frequently pull the tapes because all of these hearings are taped. So in addition to having the summary from the examiner, which I have had on many instances reviewed by some of the senior staff, we literally go get the tape out of the file and play the tape to see just exactly how that examiner conducted themselves, how the inmate conducted themselves and how counsel conducted themselves. And I have to say that in most instances, I have been extremely impressed in that very few have I had to criticize the professionalism of our people. And as I say, we are not in the business of pleasing a lot of people, unfortunately.

Mr. SCHUMER. Thank you, Mr. Chairman.

Thank you, Mr. Chairman.

Mr. McCOLLUM. Thank you, Mr. Schumer. All of these thank-yous.

Mr. Scott, do you have more questions?

Mr. SCOTT. Thank you, Mr. Chairman.

A couple of quick questions. Do we have—do we know what your budget is? Has that been put in the record?

Mr. REILLY. The budget for the 1997 fiscal year, Congressman, will be for \$5,200,000, 43 positions.

Mr. SCOTT. The number of hearing examiners that you have?

Mr. REILLY. Actually, if we put everybody to work, we have five right now.

Mr. SCOTT. Hearing examiners?

Mr. REILLY. Hearing examiners.

Mr. SCOTT. What do you mean about if you put everybody to work?

Mr. REILLY. Well, the Director of Case Operations—

Mr. SCOTT. I think the—you know, oversight is the responsibility that we in this committee have.

Mr. REILLY. I am corrected. We have six—if I put everybody to work, we have six. If I put everybody, Director of Case Operations and so on, it would be eight. That is what we have right now.

Mr. SCOTT. OK. And wherever you place this function, what is—is there any expectation that you could need fewer hearing examiners? You would need the same number of hearing examiners?

Mr. REILLY. No, I am not—I am not sure. We have, as I said earlier, and I am not sure whether you were in the room——

Mr. SCOTT. You have the same number of hearings?

Mr. REILLY. Yes. We have the hearings. If we had a Commissioner or two that decide they want to start doing hearings, they are certainly entitled to if they want to.

Mr. SCOTT. That would happen wherever you put the function, that you would have the same number of hearings?

Mr. REILLY. Yes.

Mr. SCOTT. How much of the cost—how much of the \$5.5 million is conducting the hearings that you can't get away from by moving the function somewhere else?

Mr. REILLY. I don't know that I can give you that figure right off the top of my head, but I can certainly provide it to the committee.

Mr. SCOTT. OK.

Mr. REILLY. It is pointed out to me that the function of issuing warrants for the arrest of people who are out on parole supervision and so on, and as I indicated we have got 9,000 out there——

Mr. SCOTT. Wherever you put that, that isn't going anywhere?

Mr. REILLY. That doesn't change.

Mr. SCOTT. So if you could give me an idea what costs you would still be stuck with wherever you put the function, I would appreciate that after the hearing.

Mr. REILLY. OK.

Mr. SCOTT. Now, do you supervise parolees? Do you provide any supervision?

Mr. REILLY. They are all supervised—yes, they are under our supervision, ultimately to make the decisions. But the probation, parole service of the courts, are the ones that by statute are assigned to actually supervise those individuals once they have been paroled.

Mr. SCOTT. OK. Now, we are not talking about doing anything with that function.

Mr. REILLY. Not at all.

Mr. SCOTT. OK.

Now, the people we are talking about now, the old-law prisoners, have—let me see. They committed an offense prior to 1987 or sentenced prior to 1987?

Mr. REILLY. Correct.

Judge ARCARA. Committed an offense.

Mr. LITT. Committed an offense prior to November 1, 1987.

Mr. SCOTT. They committed an offense prior to 1987?

Mr. REILLY. Yes.

Mr. SCOTT. That is 9 years, so most of them have been in a little while. How many of the old-law prisoners have never been considered for parole yet? You mentioned 6,500 old-law prisoners and about 5,000 have had a parole date?

Mr. REILLY. That is a question that—that is a question that I cannot answer for you at this moment, because we have asked—I have asked the same question. How many have not requested a

hearing, seriously, that are in the system that are parole-eligible? And I don't have that number, but we will try to get it.

Mr. SCOTT. I assume you have got some in there that have been denied parole already a number of times.

Mr. REILLY. Oh, a number of times, correct. My staff tells me there are 1,800 who have not had a hearing at all.

Mr. SCOTT. OK. Then you have got a lot that have been denied a number of times and a lot of whom you can pretty well figure out will never get a discretionary parole?

Mr. REILLY. Right.

Mr. SCOTT. Will serve out their full time?

Mr. REILLY. Right.

Mr. SCOTT. Now, when you decide who gets parole and who doesn't, is this a random process or a deliberate process?

Mr. REILLY. Very deliberative process.

Mr. SCOTT. Do the factors that you consider make any difference at all?

Mr. REILLY. What factors?

Mr. SCOTT. You mentioned GED, job training, parole plan. I assume part of it is whether or not they have somewhere to go and something to do. Attitude while they have been in prison.

Mr. REILLY. Without question, Congressman, we look at what the plan is that they have worked out with their case manager and that they are submitting to us.

Mr. SCOTT. And does that make any difference?

Mr. REILLY. Certainly, it makes some difference.

Mr. SCOTT. Then if it makes a difference, if you have a choice of giving somebody 3 to 20 or 6 ready or not, you are going to get sprung out, which makes more sense?

Mr. REILLY. Well, I think, you know, whatever we do in this issue it is a value judgment that is made by the—by the Commissioner who reviews that particular case.

Mr. SCOTT. Well, for the protection of society, if you had 100 people for a particular sentence, does it make more sense to sentence them to 3 to 20 and let them out as they are already or spring them all out in 6 years?

Mr. REILLY. I am not sure I understand the question.

Mr. SCOTT. Well, the question—you nodded, everybody kind of nodded their heads that we need to go to truth in sentencing. That is the question, whether or not you spring everybody out in 6 years or whether you have the right to hold the most heinous, unrepentant, non-GED, nonjob training, uncooperative people, the full 20, and let those who get a Ph.D. in the first 3 years, let them out early and hold ones that are dangerous to society longer?

Mr. REILLY. OK. I understand what you are saying. That decision was made when Congress abolished parole and decided you were going to have a determinant sentencing structure to remove disparity, hopefully, from the—and to also provide certainty of sentence and fairness in the sense that—

Mr. SCOTT. Well, you kind of nodded that it was a good idea and I am wondering if you are—it is a good idea because we did it or because it is a good idea. You mentioned that there were some, many, very dangerous prisoners that you deal with and some

that—I assume by saying many, you are saying some that are not that dangerous.

Mr. REILLY. Correct.

Mr. SCOTT. My question is why you would let—the truth-in-sentencing is a half truth and a whole truth on this thing, because the half truth is that nobody gets out early. The whole truth is that you can't hold people longer, either. Now, my question is: If you have got some in the many dangerous category and some in the not dangerous category, why it makes sense to spring them all out on the public at the same time and not hold the more dangerous one longer using your deliberate process and let the less dangerous out early and still on average they have served the same length of time? Why do you want to let the most dangerous ones out early?

Mr. REILLY. Well, I think we are getting into a debate. I can see it coming.

Mr. SCOTT. You already got into the debate when you answered the question.

Mr. REILLY. A determinant and indeterminate sentencing structure. Let me just say that having served as a legislator and having experienced the change we had in our own State of Kansas, when I left they were discussing guidelines. They ultimately passed sentencing guidelines and they still have, of course, the parole function like we have here. They had to.

They couldn't do away with it, either. So there is a strong feeling that by having a determinant structure where people know exactly what is coming to them, it gives the judges, the judiciary, very strict guidelines just like we have guidelines.

Mr. SCOTT. I can start off by saying that is a great sound bite and will get you votes. My question is whether it makes any sense?

Mr. LITT. Can I interject one thing here? I think that dangerousness is not the only thing that we need to take account in sentencing. Some of these people who are still serving old law sentences got lengthy sentences for stealing millions or tens of millions from financial institutions or other crimes where if you look at them right now you could say, these people aren't dangerous. They are not going to go out on the street and knock heads. And yet I think there is a substantial interest that is served by providing long sentences for this kind of offender for deterrent purposes. So I think that it—the problem—is an extremely complex and complicated one. We have made the judgment that we would prefer the social benefits that we get from the determinant sentence to those.

Mr. SCOTT. I am trying to determine what those social benefits are because if—you have already answered the question for the record that you thought it was a good idea. My question is why it is a good idea to let Charles Manson out with a two-thirds reduction in his sentence so that someone who got a GED, job training, and is not a danger to society gets out a little earlier and we can hold Charles Manson longer.

My question is: Why do you think Charles Manson ought to get a two-thirds reduction in his sentence? Because that is the whole truth. When you sentence people to 3 to 20 or 6, everybody gets sprung out in 6, that is the question. The truth-in-sentencing is, everybody gets out in 6. The liberal, deceitful, lenient parole plan, as

my Governor calls it, everybody gets out 3 to 20 but you have got to earn your way out.

My view is that Charles Manson, you can hold for 20 years or 6 years, I would rather hold him for 20 and if that means that somebody who does well and gets a Ph.D. and job training and everything else that Mr. Reilly considers and earns his way out early, you can let him out early but you can hold Charles Manson three times longer.

Now my question to you is why you think Charles Manson ought to get out early and what the benefit to society is since you nodded your head that truth-in-sentencing was such a good idea.

Mr. MCCOLLUM. I would love to testify, to answer that question, Mr. Scott. I don't know that your question has an answer that they can give you because, obviously, you know, the Federal system, as I understand it, they can correct me if I am wrong, there is not that kind of a range in determinant sentencing. You have a determinant—if somebody gets 20 years, since 1987, you are going to serve, except for good time, 20 years.

Now, that may not be true in Virginia and some States it may not be true, but it is true in the Federal system and it would be what I would advocate as a proponent of determinant sentencing as the preferable way to go for all States.

So Charles Manson, he isn't going to get out in a less period of type. Presumably his sentence is going to be based upon how dangerous he was or whether or not it is a deterrent to society to have him in longer. If it is a white collar crime, like Mr. Litt says, the judge is going to make that decision and the court is going to make that decision.

Mr. SCOTT. If you are going to give Charles Manson 20, that means the group that would have gotten that sentence would have gotten between 10 and 40.

Mr. MCCOLLUM. What group?

Mr. SCOTT. Ten and 60. The equivalent parole system penalty for a 20-year—everybody serves 20 would be something like 10—actually do about 10 to about 60. Now, my question is, are you going to hold Charles Manson 60 years or let him out in 20? Now, I think Charles Manson—

Mr. MCCOLLUM. But the truth is that there are very few people who are going to be under the current system held for that long. We know the averages are like Judge Arcara said earlier in his testimony, in most States, in most places where they have parole today, criminals serve less than a third of their sentences.

Mr. SCOTT. A third of what sentence?

Mr. MCCOLLUM. The sentence—

Mr. SCOTT. A third of 20?

Mr. LITT. I think the point—

Mr. SCOTT. They serve an average of 7. You keep moving the goal post. The equivalent sentences for the choice between truth-in-sentencing and a parole plan is 3 to 20 or 6.

Mr. MCCOLLUM. Well, they are serving a lot less time. Let's put it this way: I think the facts are really very clear that across this Nation that those who are under systems that are not determinant and have paroles are serving—criminals are serving far fewer actual years for the same crime. That is just a fact.

Mr. SCOTT. Then I have got two questions. Does it make more sense to increase 3 to 20 so everybody serves 10, Charles Manson gets out in half the time, or 6 to 40, where Charles Manson can serve 40 years? If you are going to increase sentencing, it seems to me rather than do it behind the back door in the truth-in-sentencing scheme, that you do it above the table and change 3 to 20 to 6 to 40.

Mr. MCCOLLUM. We want Charles Manson to serve life anyway and we want it to be determinant. We don't want him to get out. And if it is a person who is going to get—who has committed a lesser crime, we want him to serve 3 or 5 or 10 or whatever it is. The message is and the issue here is that is the social policy Mr. Litt is talking about, and I concur very strongly.

You know, you and I have debated this before, and we are taking up the witnesses' time with this debate, but the bottom line is it is a huge dispute between you and I. There is a difference between those who think your way and those who believe the way I do. The deterrence message is very important but I think there is also the issue of just put them away, lock them up, throw away the key, and that is what the courts are now beginning to get in determinant sentencing dates.

Mr. SCOTT. Can I ask one more question?

Mr. MCCOLLUM. You may ask a question.

Mr. SCOTT. We have had testimony before that there was very little reduction—effect on recidivism achieved by merely lengthening the sentence; that the factors that reduce recidivism are the factors that Mr. Reilly pointed out; did they get a GED, did they get job training. I assume you review whether or not they have somewhere to go and something to do when they get out. That those are the factors that are correlated with recidivism rather than the number—the actual number of days served.

Is that your experience, Mr. Reilly?

Mr. REILLY. Well, it has been my experience in some instances, that's for sure. You can't just say that across the board. In some instances, you have people that have been successful because of acquiring some of those skills and so on and learning the trade, et cetera. No question about it. We have learned that at the State level. But, you know, we argued the same things that we are talking about here this morning when we were in the legislature about what system—

Mr. SCOTT. Well, what are the predictors?

Mr. REILLY. Rehabilitation—

Mr. SCOTT. What are the predictors of recidivism?

Mr. REILLY. Let me, if I may.

Mr. SCOTT. You mentioned job training. You mentioned—

Mr. REILLY. Let me, Mr. Chairman, if I might, call on Mr. Hoffman who is with us, who is our Staff Director who has been with the Sentencing Commission and was also very involved with the sentencing guidelines.

Mr. MCCOLLUM. I would be delighted to but I don't want this hearing to go too far afield. I know Mr. Scott wants to explore this issue. Maybe we ought to have a separate hearing to do that.

Mr. REILLY. I would like him to comment on it.

Mr. MCCOLLUM. Certainly, he can comment on it.

Mr. REILLY. This is Dr. Peter Hoffman, who is our Staff Director.

Mr. MCCOLLUM. Dr. Hoffman.

Mr. HOFFMAN. The Federal Parole Board found with research studies that most of the factors predicting recidivism were those which were known at the time of sentencing. In fact, before the law for the Sentencing Commission changed, the Federal Parole Board system using guidelines based on the seriousness of the offense and these past factors was determinant in the sense that you got a date up front and you kept that date until there was disciplinary or exceptional program achievement.

Now, when the Congress moved to determinant sentencing, they kept the guidelines system. The Sentencing Commission has made it somewhat more complicated but it is basically the same system. What has been given up is the chance in the exceptional case to change the presumptive release date because of exceptional program achievement. But, in turn, what has been gained is the fact that the judges give the sentence at the time of sentencing and that is the sentence served. So that in actual practice about 11, 12 percent of the cases were changed after the presumptive release date because of the facts that you mentioned.

Now, that in the new law is no longer possible. But on the other hand, in the new law, the time served is the time of sentence. So you had a change which picked up one thing and moved another thing. But overall, the way the Federal parole system operated since 1972 was not like the State systems, and with the exception of that 11 percent of the cases, it is fairly similar to the way the new law system operates now.

Mr. MCCOLLUM. Thank you very much, Dr. Hoffman.

Mr. SCOTT. Mr. Chairman, could I ask the gentleman to forward a copy of the report to me? Because it is the first time that I have heard anyone suggest that whether or not you got a GED, job training, and other factors during your prison term were not the predominate factors and would suggest that the Parole Board decisions make very little difference at all, which is not what Mr. Reilly has testified to. So I would like—

Mr. MCCOLLUM. Well, I am not quite sure that that would be my characterization of Mr. Reilly's testimony, but you certainly can have the report forwarded.

I would like to conclude the hearing with just a couple of questions back on the subject that we are trying to resolve here on this question of the law change.

Is there anything magic about the—well, first of all, when does the proposed law, and I don't have it in front of me here, take us down to three Commissioners from four to three?

Mr. REILLY. That is embodied, Congressman, in S. 1507.

Mr. MCCOLLUM. Right. When would that become effective under 1507?

Mr. REILLY. October, as I understand.

Mr. MCCOLLUM. Next year? Immediately when the law becomes effective?

Mr. REILLY. Yes.

Mr. MCCOLLUM. Is there anything magic about the three? Does it complicate your life to have as few as three even if you went down to 500 people to review? Or are we going to have a couple

of Commissioners at some point in the 5 years sitting around twiddling their thumbs even at three?

Mr. REILLY. No, there is no magic number in that. As the legislation is drafted, you could even conceivably go to one.

Mr. MCCOLLUM. Go could to one?

Mr. REILLY. Could go to one. I think that is a matter, obviously, that would be left with the administration because they make the appointments for the Commission.

Mr. MCCOLLUM. No, I understand. But I am just thinking in terms of the fact that eventually if the caseload is small enough, one Commissioner could do it?

Mr. REILLY. Yes.

Mr. MCCOLLUM. All right. What happens to the Appeals Board at that point? How is it affected when it gets that small?

Mr. REILLY. Well, you would have to address that, I believe, in the legislation, obviously, because you would end up that—there wouldn't be any Appeals Board as such. The decision would be the final decision.

Mr. MCCOLLUM. Well, right now the Appeals Board consists of who?

Mr. REILLY. Consists of me, the Vice Chairman of the Commission and Commissioner Gaines was appointed recently by President Clinton.

Mr. MCCOLLUM. So you have three. And, again, I apologize for not reviewing this before but you are triggering this in my mind. Is this by statute that there be the three people on the Appeals Board?

Mr. REILLY. Yes.

Mr. MCCOLLUM. So you can't go below three Commissioners of some sort? You presumably—are you one of the three or the Chairman one of the three?

Mr. REILLY. I am now, yes.

Mr. MCCOLLUM. Yes, right. So you can't go below the three without altering the Appeals Board, too?

Mr. REILLY. It is by statute, yes.

Mr. MCCOLLUM. That explains something, because I just wanted to see how complicated we got, because we ultimately want to have the option still even when you get down to two old-law prisoners to let them have some appeal from somebody's decision. That is all part of what either you as a group should study it under some directive we give you or somehow we need to come up with an answer on that.

Another—and it also occurs to me, why I raised it now, is that you may not need three Commissioners, as you have said, all the way through 5 years.

Mr. REILLY. Yes.

Mr. MCCOLLUM. From the standpoint of the regular review work, you may not need to have that many numbers. And presumably, as you say, the administration could choose not to appoint more. But they are four terms and it depends on how we word the statute, I reckon, as to how effective that option really is.

Let me also suggest that—or ask a question about the examiners. Would the examiners or could the costs be reduced on this travel if the examiners were actually, some of them, housed or placed in

the field? You know, like we have, somebody in Atlanta, somebody in California? Or are they already that way?

Mr. REILLY. Now, we originally had that. It was that way when we had regional offices.

Mr. MCCOLLUM. Right.

Mr. REILLY. Examiners were located in those regions. When we closed the Dallas region 2 years ago and then we closed Kansas City and then we closed the region here and consolidated it all in one office, there were examiners in those regions. We are again utilizing as a cost-saving measure some of the retired examiners on a contract basis when needed. Such as California, for example, we have one of our examiners out there who is a very qualified, long-time employee, he is used frequently out there.

The majority of—well, not the majority. All of the other examiners are housed here. What you are asking me is, should we send somebody, say, down to Oklahoma and leave them down there to do all the revocation hearings? We have discussed that. We have never found that it could be done cost effectively.

Mr. MCCOLLUM. Well, obviously that is the bottom line question, and with your costs being that high for it.

The last point or question is really an observation. You have indicated, and I thought very eloquently, to Mr. Schumer's question, about the monitoring of these examiners, that you have reviewed the tapes and you have listened to the hearings and you are convinced that there are very rare cases where they abuse it.

For what it is worth, the subcommittee has received a substantial number of inquiries in the past year or so from attorneys who have complained strenuously to us that examiners come into these hearings, that they have not read the materials and they didn't even ask any questions. And I gather you are saying you are not finding that to be a very frequent occurrence.

But you should be aware at least, and perhaps you are aware from our staff, that this has, indeed, occurred, that attorneys have said that to us and that it hasn't just been an isolated instance of once or twice. So that is somewhat disturbing because I am sure you can't and don't sit there and listen to all the tapes, unless there is some reason for you to do that.

Mr. REILLY. Right.

Mr. MCCOLLUM. I would hope that that is—I hope that the attorney's representation is not representative of wider spread abuse than you think. I just make that observation as a concern. I don't know that there is anything any of us can do, except encourage you with the limited resources you have to continue that monitoring and perhaps to do a little bit more random than you may already be doing.

Mr. REILLY. I can assure you we will. And if we, with the help of your staff, if we could have some cooperation in trying to identify some of those, we definitely will report to the committee what we learned.

Mr. MCCOLLUM. Well, I want to thank all of you for coming today.

Mr. SCOTT. Mr. Chairman, could I ask a couple of other questions, very briefly?

Mr. McCOLLUM. If it is on this subject. I don't want to get off on another debate with you over determinant sentencing.

Mr. SCOTT. I will behave.

Mr. McCOLLUM. Thank you.

Mr. SCOTT. When the examiner shows up at a prison, on average, how many hearings will he have?

Mr. REILLY. It will vary, but the docket in Oklahoma City, for example, on revocations has been running anywhere from 40 to 60.

Mr. SCOTT. And I assume they go on a tour of all the prison sites where there are old-law prisoners?

Mr. REILLY. Well, I wouldn't call—I wouldn't refer to it as a tour but the—in other words, we set up these hearing dockets and if there is a docket at Leavenworth, we try to coordinate it so that if we have a docket we are going to be seeing 8, 9 inmates, whatever, 10. In some instances we don't have that luxury. We may have to go because of the statute and the individual. But as I said, the Bureau has cooperated with us to try to consolidate those folks if necessary, and they may move them to an institution that we do go to and travel to so that we can combine that hearing with a number of cases.

Mr. SCOTT. Now, in moving people around to accommodate the parole schedule, do you run into complaints about—from families that are not particular about having to travel further?

Mr. REILLY. I must say that—not to my knowledge, we have not. And we—it has not been called to my attention anyway if there have been complaints in that regard.

Mr. SCOTT. Thank you.

Mr. McCOLLUM. Well, as we say thank you to you once again, I just want to make one last comment to you, Judge Arcara because, obviously, we are going to run out and vote. If we give you the responsibility, or even if we don't, and there is a discussion that obviously will take place in the future after 5 years or whatever we do, if we extend the life of the Parole Commission, one consideration I certainly hope you will think about for all of us is even when it gets down to 35 or 40 old-law prisoners, will there be a legal or a technical problem with judges having this function, and to what degree could we have a construct that would still allow perhaps the functions to be economically handled in the judiciary branch of Government but not maybe the judges doing it in a way that would somehow give any opportunity, legally, for a prisoner to say they are not having their due justice in the parole system that they had been entitled to?

I don't know that I expect you to answer that right now for me, but I am concerned about it. I do not believe it will be efficient for the Parole Commission to exist forever, and nobody here today thinks so. You have all said that. And I think probably the most efficient thing would be for the residuals to wind up. You already have the probation part of the—probation part of this over there. And there is no reason why you couldn't supervise the smaller numbers. But what about the legal questions? What kind of construct could we come up with that would consider any constitutional issues and not allow prisoners to possibly skate by?

Judge ARCARA. Mr. Chairman, I would certainly like to give that some thought and maybe have an opportunity to respond to that question in writing.

Mr. MCCOLLUM. Certainly.

Judge ARCARA. Because I am speaking for the Judicial Conference of the United States.

Mr. MCCOLLUM. I know.

Judge ARCARA. And obviously, like the Department of Justice is concerned about some perceptions and ethical considerations, there may be some that we have to give some more further thought to and I would like to think about it.

Mr. MCCOLLUM. Certainly.

Judge ARCARA. And respond to that, sir.

Mr. MCCOLLUM. Thank you very much. Thank all of you for appearing.

The hearing is adjourned.

[Whereupon, at 11:40 a.m., the subcommittee adjourned.]

APPENDIX

LETTER DATED JUNE 12, 1996, TO CHAIRMAN MCCOLLUM, FROM
EDWARD F. REILLY, JR., CHAIRMAN, U.S. PAROLE COMMISSION,
U.S. DEPARTMENT OF JUSTICE



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United States Parole Commission

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June 12, 1996

The Honorable Bill McCollum
Chairman, Subcommittee on Crime
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

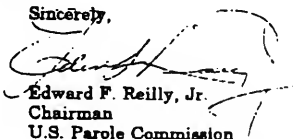
Dear Mr. Chairman:

I deeply appreciate the courtesy extended to me last Thursday when the Subcommittee on Crime permitted me to testify with regard to the urgent need for legislation to resolve the status of the U.S. Parole Commission. I was greatly encouraged by your announcement that the Subcommittee will be working on such legislation over the next few weeks, and I stand ready to offer any assistance that the Subcommittee may request. During Thursday's hearing, I was asked a number of questions that required written answers, and I will attempt to supply those answers in this letter.

The first was your request for a comparison of the Commission's current and anticipated caseloads with the Commission's caseload for FY 1990. In FY 1990, the Commission had a staff of 163 employees (including nine U.S. Parole Commissioners) and five regional offices. Its caseload for FY 1990 was 13,568 in-person hearings and 29,525 additional decisions based upon file reviews. In FY 1996, the Commission has only 49 permanent positions and four U.S. Parole Commissioners. It has closed its last remaining regional office. Its total caseload for FY 1996 will be 3,330 in-person hearings and 12,218 additional decisions based on file reviews. We anticipate that in FY 1998, 2,400 in-person hearings and 7,800 additional decisions based on file reviews will have to be conducted.¹

If the Subcommittee has any further questions, I would be glad to answer them.

Sincerely,



Edward F. Reilly, Jr.
Chairman
U.S. Parole Commission

¹The above figures do not include the file reviews that law and regulation require to be conducted in order to achieve a panel recommendation (concurrence of two hearing examiners) prior to presentation of the case to a Commissioner. If such file reviews are included, the total file review figure for FY 1990 would be approximately 43,000 file reviews. For FY 1996 the total would be 16,900 file reviews, and for FY 1998 the projected total would be an estimated 10,792 file reviews.

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